No. 548

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D., 1919

EUGENE M. TRAVIS, as Comptroller of the State of New York

Appellant

against

THE YALE & TOWNE MANUFACTURING COMPANY

Appellee

BRIEF FOR APPELLEE

Louis H. Porter
Archibald Cox
Counsel for Appellee

Appeal Printing Company, New York City.

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPELLEE'S BRIEF.

This appeal presents questions as to the constitutionality of portions of Chapter 627 of the Laws of 1919 of the State of New York, which added to the tax laws of the State a new article entitled "Taxes Upon and With Respect to Personal Incomes" (Rec., p. 26).

The statute imposes a tax upon every resident of the State "upon and with respect to his entire net income as herein defined" and "a like tax * * * upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this State by natural persons not residents of the State" (Sec. 351, Rec., p. 28).

Under this statute, "it is obvious that the tax on residents and non-residents is the same, regardless of the different phraseology" (Appellant's Brief, p. 10), in so far as the essential nature of the tax is concerned. This suit questions only the constitutionality of portions of the statute imposing the tax on non-residents.

Furthermore, this suit does not involve a determination of the validity of the tax on such income of non-residents as is derived from property within the State.

The sole question here is as to the power to impose a tax on income derived by a non-resident from his personal services or exertions performed within the State. The question is further narrowed in the instant case by the fact that such income comes from salary paid by another non-resident.

The Essential Character of the Provisions of the Statute Questioned.

The attempt to impose such a tax upon non-residents necessarily presents certain difficulties which this statute seeks to meet in ways which reveal the unconstitutionality of the enactment. As matter of settled law, as well as practical experience, a State can successfully reach only those persons and things which are within its territorial boundaries with such degree of permanence as confers jurisdiction. Where it is sought to exercise jurisdiction over the person by the imposition of personal liability for a tax, the presence of the person within the State, with some such degree of permanence as is implied in the term "resident," is necessary, because otherwise the State cannot enforce the personal liability either practically or legally. Similarly, the net income (regarded as a piece of property, if that is possible) is never within the territorial jurisdiction of the State, in the case of many non-residents. In the present instance, for example, many of appellee's employees receive even their gross salaries outside the State of New York (Rec., p. 3c); and, as a practical matter, that could, of course, be readily arranged in all cases.

Apparently recognizing these difficulties this statute attempts to deal with the non-resident by imposing a personal liability upon someone else within the State who has control of payment to the non-resident of sums entering into the computation of the net income. Such a person is designated a "withholding agent" and made personally liable unless the non-resident pay the

tax (Sec. 366, Rec., p. 36). In other words, the State being unable to reach the non-resident or his net income (because in many cases both are outside its jurisdiction), seeks to accomplish the result by imposing personal liability for the payment of a sum in excess of the tax upon another whom the State can reach, in this instance, the non-resident's employer, a Connecticut corporation doing business also in New York and owning property there (Rec., p. 2b).

It is to be observed in passing (with reference to the Attorney General's argument as to power in fact) that this same method would enable the State of New York to tax appellee's employes in Connecticut, who never come within the State of New York, on their entire net income or Connecticut real estate, so far as power in fact is concerned.

This method of seeking to reach the non-resident's net income in fact requires this appellee to expend more than a thousand dollars a year to collect for the State of New York little more than three thousand dollars a year in taxes measured by the net incomes of its non-resident employees who have performed some services in New York (Rec., p. 3c., 7).

SUMMARY OF POINTS.

I. The action of the State of New York in requiring a Connecticut corporation thus to withhold portions of its payments to its Connecticut employees in Connecticut, is respectfully questioned, on the authority of the decision of this Court in *New York, Lake Erie & Western Railroad Co.* v. *Pennsylvania*, 153 U. S., 628.

The questions of more general importance are these:

II. The portions of the statute relating to the taxation of non-residents are inconsistent with the "due process of law" clause of the Fourteenth Amendment, because they seek to tax persons or property beyond the jurisdiction of the State; and

III. Since those provisions discriminate against those who are citizens of other States, and to the extent that they so discriminate, they are inconsistent with the "privileges and immunities" clauses of Article IV and the Fourteenth Amendment, as well as denying to non-residents the equal protection of the laws.

The Court below proceeded upon the ground that since the statute plainly operates to discriminate against citizens of other States, it was unnecessary to consider the other questions. We refer first to the right of this appellee to maintain this bill in equity, and then to the three principal questions concerning the constitutionality of this tax.

ARGUMENT.

The Bill in Equity was Properly Filed by Appellee as Complainant.

In the case at bar, a statute of the State of New York makes a Connecticut corporation personally liable for a certain percentage of each salary paid by it to Connecticut citizens and residents who have done any work for it in New York, unless the non-resident shows under oath, and pays to the State of New York a percentage of something else, to wit, his "net income as herein defined" (Secs. 366, 367, Rec. pp. 36, 37).

The appellee is, accordingly, placed in this position: Being a citizen of Connecticut, with its factory and principal place of business in Connecticut, and employing sundry persons, including citizens and residents of Connecticut, to whom it had contracted to pay definite salaries for their services, various fractions of which are performed in the State of New York, it is directed by the statute to deduct and withhold a percentage of such gross salaries of such employees. If it does so, such employees can, of course, sue it for breach of contract, and the suit would be between citizens of Connecticut, in the Connecticut courts. If it refuses to withhold, it subjects itself to personal liability for that percentage of the gross salary and judgments and penalties under the statute (Secs. 366, 373, 376, 379, 380, 381, Rec., pp. 36, 39, 41, 42.) Accordingly, this suit in equity is its proper recourse.

Cummings v. *National Bank*, 101 U. S., 153;
Pelton v. *National Bank*, 101 U. S., 143;
Hills v. *Exchange Bank*, 105 U. S., 319;
Johnson v. *Wells Fargo & Co.*, 239 U. S., 234;
Green v. *Louisville & Interurban R. R. Co.*, 244 U. S., 499.

POINT I.

The provisions of the statute which require a Connecticut corporation to withhold and pay to the State of New York a portion of the gross salaries it has agreed to pay to its non-resident employees in Connecticut are unconstitutional.

The appellee's factory and principal place of business is at Stamford, Connecticut. It is authorized to do business in New York and owns property there, but it is a citizen and resident of Connecticut; and the statute, of course, applies equally to an individual in its position. It employs sundry persons, including citizens and residents of Connecticut and New Jersey, to work for it, and has contracted to pay them definite salaries for their services. These salaries are paid in different ways, in some instances by checks mailed from the office in Connecticut to the employees outside the State of New York, if that is material (R., pp. 2b, 3c). And they are in accordance with contracts of employment entered into before the enactment of the law (*ib.*). The statute seeks to impose on the appellee a personal liability as the means of compelling it to obey.

The invalidity of such provisions seems to be directly established by *New York, Lake Erie & Western Railroad* v. *Pennsylvania* (*supra*), (153 U. S., 628). In that case, Pennsylvania attempted to impose upon a New York corporation authorized to run its railroad through the State of Pennsylvania, the duty of deducting from the interest due on evidences the indebtedness held by residents of Pennsylvania the amount assessed

upon bonds and moneyed capital in the hands of such residents of Pennsylvania. In that case, the payees were within the jurisdiction of Pennsylvania. Here, there seems to be not even that much connection with the jurisdiction of the State seeking to have the foreign corporation withhold its extra-state payments. In that case the Court said:

> "If Pennsylvania, in order to collect taxes assessed upon bonds issued by its own corporations and held by its resident citizens, could require those corporations to deduct the required amount from the interest when the coupons are presented by holders known at the time by the corporation paying the interest to be residents of that State—and it may be admitted, in this case, that the State, if not restrained by a valid contract to which it was a party, could establish such a regulation—it does not follow that the State may impose upon foreign corporations, because of their doing business in that State with its permission given for a valuable consideration, any duty in respect to the mode in which they shall perform their obligations in other states.
>
> "The New York, Lake Erie & Western Railroad Company is not subject to regulations established by Pennsylvania in respect to the mode in which it shall transact its business in the State of New York. The money in the hands of the company in New York to be applied by it in the payment of interest, which by the terms of the contract is payable in New York and not elsewhere, is property beyond the jurisdiction of Pennsylvania, and Pennsylvania is without power to say how the corporation holding such money, in another state shall apply it, and to inflict a penalty upon it for not applying it as directed by its statutes; especially may not Pennsylvania, di-

> rectly or indirectly, interpose between the corporation and its creditor, and forbid it to perform its contract with creditors according to its terms and according to the law of the place of performance. No principle is better settled than that the power of a State, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction" (p. 646).

A corporation or individual, by securing authority to transact business within a State, does not thereby bring within the jurisdiction of that State its transactions and properties wholly without the State. It is not a matter of convenient collection, but a matter of jurisdiction.

In *Hatch* v. *Reardon*, 204 U. S., 152; *Merchants' and Manufacturers' Bank* v. *Pennsylvania*, 167 U. S., 461; *Travelers' Insurance Co.* v. *Connecticut*, 185 U. S., 364; *Brushaber* v. *Union Pacific*, 240 U. S., 1; *Citizens' National Bank* v. *Kentucky*, 217 U. S., 443, the jurisdiction over the person or transaction was plain. But here we have an effort to control payments made outside the State, under contracts made outside the State, by a corporation, a citizen of another State, to citizens and residents of other States. Such control of persons and things beyond the jurisdiction of the State, sought to be accomplished by imposing a personal liability upon the corporation coming within the State only for other purposes, seems plainly to conflict with the rule illustrated and sanctioned by *New York, Lake Erie & Western Railroad* v. *Pennsylvania* (supra).

POINT II.

The provisions of the statute relating to the taxation of non-residents are inconsistent with the "due process of law" clause of the Fourteenth Amendment, because they tax persons or things outside the jurisdiction of the State of New York and within the jurisdiction of other States.

That taxation by a State of persons or property outside its jurisdiction and within the jurisdiction of another State constitutes a taking of property without due process of law is "firmly established" (216 U. S. 1) "has been repeatedly held by this Court" (199 U. S. 194). "No principle is better settled" (153 U. S. 628).

> *Cleveland, etc., Co.* v. *Pennsylvania* (*State Tax on Foreign held Bonds*), 15 Wall., 300;
>
> *New York, Lake Erie and Western* v. *Pennsylvania*, 153 U. S., 628 (*supra*);
>
> *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S., 194;
>
> *Western Union* v. *Kansas*, 216 U. S., 1;
>
> *Delaware, Lackawanna, etc., Co.* v. *Pennsylvania*, 198 U. S., 341;
>
> *Dewey* v. *Des Moines*, 173 U. S., 193.

To determine the constitutionality of this tax, it is accordingly necessary to ascertain, not colloquially, but from a jurisdictional standpoint what is taxed, and whether that is within the jurisdiction of the State of New York.

The applicable definitions of the law are:

"Sec. 357. The term 'net income' means

the gross income of a taxpayer less the deductions allowed by this article. * * * (Rec., p. 29).

"Sec. 359. * * * The term 'gross income': includes gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * (Rec., p. 30).

"In the case of taxpayers other than residents, gross income includes only the gross income from sources within the state, but shall not include annuities, interest on bank deposits, interest on bonds, notes or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article" (Rec., p. 31).

Under the provisions of these sections, the Comptroller of the State has properly ruled that in the case of employees of the plaintiff corporation who are engaged any part of their working time in services within New York, a tax accrues measured by the proportionate amount of their income derived from such personal service. The exemption of those having earnings of less than one thousand dollars obviously does not affect the jurisdictional question. The question is, what is here the subject upon which the tax is imposed.

In *State Tax on Foreign Held Bonds*, 15 Wall, 300, this court defined the possible subjects of taxation:

> "These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imports, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways" (p. 519).

Many so-called business taxes are license taxes charged as a condition for permission to do something which the taxing power can prohibit. The exaction of such a license tax is strictly an exertion of the police power, whose jurisdiction is wholly different from that of taxation. This distinction is well recognized and is summarized in *Cyc*,

> "Power to license, which, strictly speaking, is simply a power to sell a privilege, may be maintained when a special benefit is conferred at the expense of the general public, or the business imposes a special burden on the public, or where the business is injurious to or involves danger to the public, * * *" (Vol. 25, p. 598).
>
> "While in a broad sense a license fee may be regarded as a tax, there is properly speaking and as generally understood a clear distinction between licensing and taxation, and between license fees and ordinary taxes. License fees exacted for the primary purpose of regulating or restraining occupations deemed dangerous to the public or to be specially in need of public control are imposed in the exercise of the police power, and not that of taxation; and where the object of the imposition is not to raise revenue, the fact that

> the fee demanded is greater than the expense of issuing the license, and therefore does in fact produce revenue, is not sufficient to make it a tax. If, however, the fee or charge is imposed solely or primarily as a means of raising revenue, it is a tax, regardless of the name by which it may be called." (Vol. 37, p. 711).

Confining the classification to true taxes, levied and collected as an attribute of sovereignty under the tax power, and from the jurisdictional standpoint, the definition of taxable subjects quoted above may properly be further limited to persons and property. This classification was adopted by this Court in

St. Louis v. *Ferry Co.*, 11 Wall, 423, 430,

where Judge Swayne said:

> "*Where there is jurisdiction neither as to person nor property, the imposition of a tax would be ultra vires and void.* If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislation as to valid judicial action." (Italics ours.)

Put in other words, the possible subjects of taxation divide themselves, for purposes of jurisdiction, into (1) those which are levied on property, where the property itself is subject to the tax, the State taking a portion of the property within its jurisdiction without regard to the owner, except

in so far as it permits the owner to pay and release the property; and (2) those which are levied on persons, which impose a personal liability which the individual is required to pay, and which is measured in one of a great many ways, as, for instance, the poll tax, the economic condition of the individual taxed, his occupation, etc.

Coosa Principles of Taxation, pp. 67, 145.

License taxes levied under the police power rest upon the right to regulate and prohibit and involve altogether different legal considerations from taxes imposed in any form under the tax power as a revenue measure.

But taxes for revenue imposed in the form of licenses are not thereby freed from the constitutional limitations on the taxing power, one of which is the requirement that a valid tax must be predicated upon jurisdiction over the person or over the property taxed. Thus in

Welton v. *Missouri*, 91 U. S., 275, 278, the Court said:

> "The general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits is admitted, but, like all other powers, must be exercised in subordination to the requirements of the Federal Constitution. Where the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer; but, if such tax conflict with any power vested in Congress by the Constitution of the United States, it will not be any the less invalid because enforced through the form of a personal license."

(1) The tax here in question is a subjective tax imposing personal liability upon the person receiving and enjoying the "net income" which merely measures the burden imposed on the taxpayer in personam.

This proposition seems plain from the following:

(a) There is no room for any suggestion that the tax on residents is anything but a tax on the person; and, as said by the Attorney-General,

> "it is obvious that the tax on residents and non-residents is the same, regardless of the different phraseology" (Appellant's Brief, p. 10).

The difference in phraseology imposing a tax "upon every resident * * * upon and with respect to his entire net income as herein defined" and " a like tax * * * upon and with respect to the entire net income as herein defined * * * from all property owned and from every business, trade, profession or occupation carried on in this State by natural persons not residents" is plainly not a change in substance. The statute defines "taxpayer" as "any person, trust or estate subject to a tax imposed by this article or whose income is in whole or in part subject to a tax imposed by this article" (Sec. 350, Rec., p. 27), and proceeds to speak of "the taxpayer" throughout—"in the case of taxpayers other than residents" (Sec. 359, par. 3, Rec., p. 31; Sec. 360, par. 11, Rec., p. 33; Sec. 367, Rec., p. 37).

In *Brady* v. *Anderson*, 240 Fed., 665, the Circuit Court of Appeals for the Second Circuit was called upon to consider whether the Federal Income Tax

Act of October 3, 1913, was a tax upon the person or a tax upon property. The Court said:

> "In our opinion, the tax is against the citizens and residents of the United States personally. They are chargeable in respect to income received by them. *The statement that the tax is upon this income does not create an obligatration in rem. It is only a way of saying that the owner is taxable with reference to the income."* (p. 667). (Italics ours.)

The Wisconsin Court, in dealing with the income tax in *State, ex. rel. Sallie F. Moon Co.* v. *Wisconsin Tax Commissioner,* 163 N. W., 639, 166 Wis., 287, said:

> "Much confusion of thought arises from regarding the income tax as a tax that is levied upon or attaches to property as such, irrespective of the person sought to be taxed. It is the recipient of the income that is taxed, not his property * * *. But the tax is upon the right or ability to produce, create, receive and enjoy, and not upon specific property. Hence, the amount of the tax is measured by the amount of the income, irrespective of the amount of specific property or ability necessary to produce or create it. In the ordinary acceptation of the term, this may be said to be a tax upon the income as the statute denominates it. But the tax does not seek to reach property or an interest in property as such. It is a burden laid upon the recipient of an income."

and in the *Income Tax Cases,* 148 Wis., 456, the Wisconsin Court reiterated this classification, saying:

> "By this act the legislature has in substance, declared that the State's system of taxation

shall be changed from a system of uniform taxation of property (which so far as personal property is concerned has proven a failure) to a system which shall be a combination of two ideas, namely, taxation of persons progressively, according to ability to pay, and taxation of real property uniformly according to value" (p. 506).

(b) The term "net income," according to this statute (Sec. 357, Rec., p. 29) means the "gross income of a taxpayer" (as defined in the statute, Sec. 359, Rec., p. 30), less certain deductions (also defined in the statute, Sec. 360, Rec., p. 31), computed as defined (Sec. 358, Rec., p. 29). The "net income" taxed under this statute is thus a balance reached by computation at the end of an annual accounting period during which receipts, expenses and losses are experienced (Sec. 358, Rec., p 29). The returns showing the computation and the taxpayer's net income for his last preceding taxable year are filed on or before the 15th day of March, in the following year (Sec. 371, Rec., p. 38), and the tax on such net income is then due and payable (Sec. 377, Rec., p. 40).

Thus, before anything taxable comes into existance or the amount of the tax can be determined, the receipts during the year must have come in and the deductions during the year must have been expended and determined, because the tax is not measured by the gross salary or amount that is received.

The liability is measured with reference to the net balance. And that net from the year's experience, is used only as a sufficient measure of the general financial condition of the individual and his personal liability to pay from any resources he can control.

(c) Even the amount of the tax varies according to the person of the recipient, and is not based upon the property or amount thereof. Thus, if the amount of income is twenty thousand dollars, it is taxed at one rate when received by one person, at another rate when received by two persons, and it is free from tax when received by twenty persons.

(d) This tax is not even measured strictly by the amount of income which a person receives. It is measured with a view to securing equality of sacrifice among taxpayers. It is not levied at a uniform rate according to the amount of income a man receives, but progressively upon the theoretical extent of the sacrifice which the individual should make for the welfare of the State—one per cent. up to ten thousand dollars, then two per cent., then three per cent. (See *State* v. *Frear*, 148 Wis., 456.)

The tax is thus plainly on the individual person and calls on him to contribute from his resources in general an amount based on his ability to contribute as measured by his individual experience during the past year.

(e) And that the tax is personal is confirmed by the provisions for its collection, none of which sound *in rem* and all of which impose personal liability. The provisions requiring employers to withhold and pay simply impose upon one who can be reached a personal liability to secure the performance of the personal liability of the nonresident beyond the jurisdiction (Sec. 366, Rec., p. 36). There is no lien upon any property for the payment of the tax, but the provisions for

compelling payment look solely to personal liability. The failure to make the return is a criminal offense (Sec. 376, Rec., p. 39). The failure to pay the tax subjects the person to penalties (Sec. 379, Rec., pp. 40, 41). The Attorney General is directed to bring suit to recover the amount of the tax and penalties and a personal judgment may be entered. (Sec. 381, Rec., pp. 41, 42). The comptroller can issue an execution to the sheriff, who can levy upon all property belonging to the person, regardless of whether the property was in any way connected with the production of the income by which the tax is measured (Sec. 380, Rec., p. 41). The liability is thus purely personal and the tax is a tax imposed upon the individual.

That a tax with respect to "net incomes" is a personal tax, from the point of view of jurisdiction similar to a poll tax, is well indicated by the language of the Supreme Court of Massachusetts in *Maguire* v. *Tax Commissioner*, 120 N. E., 162, 230 Mass. 503, where it is said:

> "The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the Commonwealth of his residence in his person, in his right to receive the income, and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom and of being protected by law. It gives security to life, liberty, and the other privileges of

dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it protects him from unjust interference * * *" (pp. 512, 513).

(f) Individual income as such dissociated from the person of the owner, has no existence and is a purely fanciful conception. An income of ten thousand dollars aside from the person who receives that income is a pure abstraction. A house worth $10,000, or goods in trade of the value of $10,000, or $10,000 of corporate bonds all have real property existence entirely irrespective of the person to whom that property belongs. Tangible property has a situs where it is located. As to many kind of intangible property the courts have found an actual, taxable situs of the property irrespective of the domicile of the owner. But an individuals taxable income can have no real existence apart from the person to whom it is a mere attribute.

(2) Since this statute thus imposes a personal tax on a non-resident of the State, it is unconstitutional.

A statute imposing a personal tax on persons over whom the State has no jurisdiction conflicts with the Fourteenth Amendment and is a taking of property without due process of law.

In *U. S.* v. *Erie Ry. Co.*, 106 U. S. 327, the question was as to the validity of the Civil War tax of 5% of the amount of interest paid by resident corporations to non-resident bondholders. The case was tried in the District Court, and was first heard on appeal by Chief Justice Waite sitting in the Circuit Court. Fed. Case No. 15056. The tax was there considered an income tax against the non-resident bondholder, and was held void, the Chief Justice saying:

> "The tax for which the suit was brought, was the tax upon the owner of the bond, and not upon the defendant. It was not a tax in the nature of a tax *in rem* upon the bond itself, but upon the income of the owner of the bond, derived from that particular piece of property. The foreign owner of these bonds was not in any respect subject to the jurisdiction of the United States, neither was this portion of his income. His debtor was, and so was the money of his debtor; but the money of his debtor did not become a part of his income until it was paid to him, and in this case the payment was outside of the United States, in accordance with the obligations of the contract which he held. The power of the United tates to tax is limited to persons, property, and business within their jurisdiction, as much as that of a State is limited to the same subjects within its jurisdiction."

When the case reached this Court, *Railroad Co.* v. *Collector*, 100 U. S., 595, had been decided, holding that this tax was not against the holder of the bonds, but an excise tax against the corporation paying the interest. In the Erie case, therefore, in a brief opinion the Chief Justice reversed his own decision at Circuit, solely upon the ground of the nature of the particular tax in question. Justice Field's dissenting opinion indicates that viewed as a tax either upon the property or the person of the non-resident recipient of the interest, the tax would have been held invalid.

In *Dewey* v. *Des Moines* (*supra*) this Court set aside as contrary to the Fourteenth Amendment a personal liability to pay a tax sought to be enforced against a non-resident because of land owned by him within the borders of the taxing state. Jurisdiction to tax the property *in rem* was held not to give jurisdiction to tax the owner *in personam*.

City of New York v. *McLean*, 170 N. Y., 374, followed and interpreted the Des Moines case, holding that a personal liability could not be asserted against a non-resident taxpayer. The Court said:

> "The Board of Taxes and Assessments in making the assessment which is sought to be enforced by this action acted judicially. Hence the important question presented is whether it had such jurisdiction of the person of the defendant as authorized it to make a personal assessment against him. That it had jurisdiction to assess the shares of stock belonging to him, and which stood in his name, is not denied. Did it have such jurisdiction of his person as authorized it to make an as-

sessment which could be enforced against him personally? We think not. No sovereignty can subject either property not within its territorial limits, or the person of one not within its boundaries to its judicial decisions. Every exercise of authority of this kind would be beyond the power of the State to grant. Legislative power ceases at the line of the State, and judicial power must also cease at that point. Jurisdiction relates to subject matter, to person, and to property. Hence the ordinary exercise of it must be founded upon the person being within the State if a personal determination is involved, or the property must be within its territory if that is the subject of this controversy. In this case, there was no jurisdiction of the person, although the jurisdiction of the property is conceded" (p. 383).

This decision followed the settled judicial authority of the State as illustrated in

Wilcox v. *City of Rochester,* 129 N. Y., 247;
Hilton v. *Fonda,* 86 N. Y., 340.

Mygatt v. *Washburn,* 15 N. Y., 316;
Litchfield v. *Vernon,* 41 N. Y., 123;
Dorwin v. *Strictland,* 57 N. Y., 492;
Stewart v. *Crysler,* 100 N. Y., 378;
Maltbie v. *Lobsitz Mills,* 223 N. Y., 227.

In *Barhyte* v. *Shepard,* 35 N. Y., 237, the Court said:

"Not being an inhabitant at all, it was both a legal and physical impossibility that he should be a taxable inhabitant; he was no more subject to their jurisdiction, as a legal proposition, than was the Emperor of China or the King of Abyssinia, and the as-

sessor had no more power to direct the imposition of a tax upon his property than upon that of those distant personages" (p. 253).

The text writers are unanimous in this limitatation on the taxing power of the state. Thus *Cooley on Taxation,* 3rd Edition, page 24, says:

> "Where a non-resident is owner of tangible property within the state, and the state imposes taxes upon it, the tax is not a charge against the owner personally, but must be enforced against the property itself. The state has no jurisdiction to assess a tax as a personal charge against non-residents; neither can the personalty of a non-resident be taxed unless it has an actual *situs* within the state, so as to be under the protection of its laws. * * * The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state."

Brown, Jurisdiction of Courts, 2nd Edition, is to the same effect. Section 160, pages 549, 550, says:

> "The state has no jurisdiction to impose any tax directly against a non-resident as a personal charge, creating a personal liability. The power of taxation must be confined to the inhabitants of the state, and it can acquire no jurisdiction over persons residing out of its territory and if such persons have real property within the state, such property may be taxed; but such tax cannot be made a personal charge against the owner, and the assessment amounts to no more than a lien against the thing taxed; and the same rule would apply to personalty; such tax would create no liability against the owner; the remedy must be confined to the thing, and the nature of the assessment is and can be

no greater than a judgment *in rem* against the thing taxed."

In *State* v. *Ross*, 23 N. J. L., 517, 521, the Court said:

> "A personal tax is the burthen imposed by government upon its own citizens for the benefits which that government affords by its protection and its laws; and any government which should attempt to impose such a tax upon the citizens of other states would justly incur the rebuke of the enlightened sentiment of the civilized world."

A statute imposing a personal tax upon non-residents cannot be justified on any plea that it is limited in amount to less than the amount which that person has received from antecedent acts within the jurisdiction. It may (or may not) seem fair that a person who has made money by transactions within a particular state, and then moved with his property elsewhere, should thereafter gratefully contribute to the support of the state whose protection gave him opportunity to accumulate his fortune. But it would hardly be suggested that the State of New York could impose a tax on a resident of Connecticut or his real estate in Connecticut simply because all his possessions had come from money made by antecedent acts in New York. The question is not at all one of fairness or gratitude, but a question of jurisdiction.

Viewed as imposing a personal liability on the taxpayer this tax does not differ in its jurisdictional aspects from a pure capitation tax. The source of the income does not in any respect change the nature and character of the tax imposed upon the recipient, and it is as much beyond

the power of the state to impose such a personal tax upon a non-resident as it is to impose a capitation tax on him. The question here at issue as to the jurisdiction to impose such a tax at all obviously has no relation either to the extent of the exercise of that jurisdiction, if it exists nor to the reasons for the exercise or non-exercise of it. If the state has not jurisdiction to impose a personal liability for tax on a non-resident, it is immaterial whether that non-resident is engaging in an occupation in the state from which he derives a large income or not. So, also if the state has the jurisdiction to impose a tax, it is immaterial whether the non-resident's occupation in the state is gainful in money or in health or in pleasure. The state either has or has not the jurisdiction to impose a personal liability against a non-resident for the payment of taxes. The cases that we have cited seem to establish that the state has not this jurisidiction and we know of no case to the contrary.

The United States comprises many States and the people travel through them freely for business and pleasure, numbers spending some time in each of several States each year and conducting a multiplicity of transactions in others. They receive protection *pro tanto* from each, whether seeking health, or pleasure, or money.

On the theory of protection to the individual while he is in the state the question of the kind of occupation, and whether gainful in dollars or gainful in health or gainful in pleasure does not seem to affect the jurisdiction to tax. If there is jurisdiction to impose the tax because a man is engaged in a pursuit leading to money, there seems equal ground to impose a tax if a man

is engaged in a pursuit leading to health or pleasure or any other desirable end. If it is once determined that each of these states may impose upon non-residents a personal income tax (and here, anticipating somewhat, it is a tax which discriminates against non-residents), on some theory that the opportunity to gain employment or health, which has bettered the person's financial condition, involved protection which justifies recompense, we should soon have conditions tending to impair the national integrity and intolerable to the individual. States cannot and do not adjust taxation with mathematical nicety, particularly where non-residents who have no representation in their governments are involved. Even double taxation is unfair, but this would mean much worse than that. And if all the laws of all the States were nicely adjusted so that each individual paid only a precisely measured proportion of his income to each of the several States which had afforded him or his transactions some protection during the year, the mere burden of the multiplicity of records and computations would itself work an aggregate of more injustice than can result from adhering to settled limits of State jurisdiction.

The situation here presented in its inevitable effect upon the integrity of the Union is of the same character as that considered by this Court in *Crandall* v. *State of Nevada*, 6 Wall., 35. In that case the Court considered the constitutionality of an act of the State of Nevada levying a "capitation tax of one dollar upon every person leaving the State by any railroad, stage coach, or other vehicle engaged or employed in the business of transporting passengers for hire." A ma-

jority of the Court were of the opinion that this law did not impose an illegal burden in interstate commerce, but the law was held unconstitutional as being opposed to the very spirit of the Constitution itself. The Court said:

> "But if the Government has these rights on her own account, the citizen also has correlatives rights. He has the right to come to the seat of government to assert any claim he may have upon that government, or to transact any business he may have with it. To seek its protection, to share its offices, to engage in administering its functions. He has a right to free access to its sea ports, through which all the operations of foreign trade and commerce are conducted, to the sub-treasuries, the land offices, the revenue offices, and the courts of justice in the several States, *and this right is in its nature independent of the will of any State over whose soil he must pass in the exercise of it*" (p. 44). (Italics ours.)

And further in discussing the Passenger cases the Court continued:

> "But the principles here laid down may be found more clearly stated in the dissenting opinion of the Chief Justice in those cases, and with more direct pertinency to the case now before us than anywhere else. After expressing his views fully in favor of the validity of the tax, which he said had exclusive reference to foreigners, so far as those cases were concerned, he proceeds to say, for the purpose of preventing misapprehension, that so far as the tax affected American citizens it could not in his opinion be maintained. He then adds: 'Living as we do under a common government, charged with the great concerns of the whole Union, every citizen of the

United States from the most remote States or territories, is entitled to free access, not only to the principal departments established at Washington, but also to its judicial tribunals and public offices in every State in the Union. * * * For all the great purposes for which the Federal government was formed we are one people, with one common country. We are all citizens of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption, as freely as in our own States. And a tax imposed by a State, for entering its territories or harbors, is inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord and mutual irritation, and they very clearly do not possess it.'

"Although these remarks are found in a dissenting opinion, they do not relate to the matter on which the dissent was founded. They accord with the inferences which we have already drawn from the Constitution itself, and from the decisions of this Court in exposition of that instrument. Those principles, as we have already stated them in this opinion, must govern the present case." (p. 48).

In the leading case of *Robins* v. *Shelby Co.*, 120 U. S. 489, holding that a license tax on drummers selling goods in interstate commerce is unconstitutional, the Court pointed out the disintegrating effect of privilege taxes on citizens of other States, saying:

"If the right exists, any New York or Chicago merchant visiting New Orleans or Jack-

> sonville for pleasure or for his health, and casually taking an order for goods to be sent from his warehouse, could be made liable to pay a tax for so doing, or be convicted of a misdemeanor for not having taken out a license." (p. 496).

The argument that it is fair that a citizen of Connecticut earning his income in New York should pay a tax to that State for the protection afforded him therein is political and legislative rather than judicial. If this argument can be properly considered by the Court, it must be weighed against the mischievous effects upon the integrity of the Union and from this standpoint the tax in question would seem inconsistent with the very spirit of the Constitution.

(3) The provisions of the statute here cannot be sustained as a tax on property.

In the case at bar, there is no room for any suggestion that the tax on income from property within a State may be justified by jurisdiction over the property. The sole question here relates to the net income computed by deducting sundry sums from salaries for personal services performed within the State. There is no property within the State yielding any of the income here involved.

The case is further narrowed by the fact that the person paying the salaries is a Connecticut corporation, a citizen and resident of another State. The statute, of course, applies equally to a non-resident natural person having an office in New York and employing non-residents to work there, or to any other case where the services of the employee alone are in New York and the salary is contracted for, owed and paid by one non-resident to another non-resident outside New York. Here, and in any such case, it is, we submit, impossible to say that there is any property within the jurisdiction of the State, and the statute cannot be justified on that ground.

A "net income" under this statute is not an article of property, but a measure of the condition of the person receiving and enjoying it. A debt of ten thousand dollars may be paid to one person or to ten, but remains a fixed measurable amount. Ten thousand dollars paid in gross salaries means nothing as to the net income of the recipients without consideration of their number and personality. Ten thousand dollars in salaries paid to a number of recipients may after the com-

putation yield an aggregate of net incomes entirely different from that which it yields if paid to one. The personal condition of the recipient, and not the amount or character of the payment made, constitutes and determines the fact of net income. It seems, therefore, impossible to conceive a net income for purposes of this taxation separate and distinct from the person receiving it.

A debt or chose in action is valueless except by virtue of the laws of the residence of the debtor, which may be invoked to enforce it. But here the laws of New York do not create, give validity to, or affect, the income of appellee's non-resident employees. They are employed and paid in Connecticut, whose laws govern the contract of employment and whose Courts enforce the contract. The services rendered are not income. The services are performed in whole or in part in New York. The net income never has any existence in New York.

The gross salary here is not owing by, or to, anyone in New York. The fact that the appellee can legally transact business in New York obviously makes no difference in the situs of the obligation. It merely places the appellee in a position to transact business in the same manner that it could if it were a natural person instead of a corporation. Where even the gross salary has no situs in New York, certainly the "net income" ultimately computed therefrom has no situs there.

Moreover, property to be taxable in a State must have some permanency there, and not be merely temporarily within the State.

> *Ayer & Lord Tie Co.* v. *Kentucky*, 202 U. S., 409;

Morgan v. *Parham*, 16 Wall, 471;
Buck v. *Beach*, 206 U. S., 392;
Union Transit Co. v. *Kentucky*, 199 U. S., 194;
Louisville etc. Ferry Co. v. *Kentucky*, 188 U. S., 385;
Delaware, Lackawanna & Western R. R. v. *Pennsylvania*, 198 U. S., 341.

It is, we submit, impossible in the present instance to find any specific property within the State of New York with enough permanency to subject it to the jurisdiction of the State; and if this tax could be considered a tax on the net income as property it would be void.

In *Buck* v. *Beach* (206 U. S., 392), notes made and payable in Ohio, were owed by a resident of New York, and kept by the owner in Indiana in the hands of an agent there. It was held that a tax on these notes by the State of Indiana was a taking of property without due process of law. The presence of the notes in Indiana did not give the property a taxable situs in that State. The Court said:

> "Generally, property in order to be the subject of taxation must be within the jurisdiction of the power assuming to tax. *State Tax on Foreign Held Bonds*, 15 Wall, 300; *Erie Railroad* v. *Pennsylvania*, 153 U. S., 628, 646; *Savings Society* v. *Multnomah County*, 169 U. S., 421, 427; *Louisville etc.* v. *Kentucky*, 188 U. S., 385; *Delaware, etc.* v. *Pennsylvania*, 198 U. S., 341; *Union Transit Co.* v. *Kentucky*, 199 U. S., 194; *Metropolitan Ins. Co.* v. *New Orleans*, 205 U. S., 395 (p. 400).
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> * * * * * * *
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> "Our decision in this case has no tendency to aid the owner of taxable property in any

effort to avoid or evade proper and legitimate taxation. The presence of the notes in Indiana formed no bar to the right, if it otherwise existed, of taxing the debts, evidenced by the notes, in Ohio. It does, however, tend to prevent the taxation in one State of property in the shape of debts not existing there and which if so taxed would make double taxation almost sure, which is certainly not to be desired and ought, wherever possible, to be prevented.

"For the reason that as the assessment in this case was made upon property which was never within the jurisdiction of the State of Indiana the State had no power to tax it, and the enforcement of such a tax would be the taking of property without due process of law" (p. 408).

In *Union Transit Co.* v. *Kentucky*, 199 U. S., 194, it was held that Kentucky could not tax a domestic corporation on tangible property permanently located outside the State. The Court said:

> "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State, to which it may be said to owe an allegience and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of

an extortion than a tax, and has been repeatedly held by this Court to be beyond the power of the legislature and a taking of property without due process of law. *Railroad Company* v. *Jackson*, 7 Wall, 262; *State Tax on Foreign Held Bonds*, 15 Wall. 300; *Tappan* v. *Merchants' National Bank*, 19 Wall, 490, 499; *Delaware, etc. R. R. Co.* v. *Pennsylvania*, 198 U. S., 341, 358. In *Chicago etc. R. R. Co.* v. *Chicago*, 166 U. S., 226, it was held, after full consideration, that the taking of private property without compensation was a denial of due process within the Fourteenth Amendment. See also *Davidson* v. *New Orleans*, 96 U. S., 97, 102; *Missouri Pacific Railway* v. *Nebraska*, 164 U. S., 403, 417; *Mount Hope Cemetery* v. *Boston*, 158 Massachusetts, 509, 519" (p. 202-203).

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"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of State laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land which, to be taxable, must be within the limits of the State. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by any Court. It is said by this Court in the *Foreign-held Bond case*, 15 Wall, 300, 319 that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised.

> "The argument against the taxability of land within the jurisdicition of another State applies with equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive protection under its laws. True, a resident owner may receive an income from such property, but the same may be said of real estate within a foreign jurisdiction. Whatever be the rights of the State with respect to the taxation of such income, it is clearly beyond its power to tax the land from which the income is derived. As we said in *Louisville &c. Ferry Co.* v. *Kentucky*, 188 U. S. 385, 396: 'While the mode, form and extent of taxation are, speaking generally, limited only by the wisdom of the legislature, that power is limited by principle inhering in the very nature of constitutional government, namely, that the taxation imposed must have relation to a subject within the jurisdiction of the taxing government.' See also *McCulloch* v. *Maryland*, 4 Wheat, 316, 429; *Hays* v. *Pacific Mail S. S. Co.*, 17 How. 596, 599; *St. Louis* v. *Ferry Co.*, 11 Wall, 423, 429, 431; *Morgan* v. *Parham*, 16 Wall, 471, 476" (pp. 204, 205).

The State of course has jurisdiction to impose a tax on property permanently within its borders, whether real or personal, and whether tangible or intangible and regardless of the residence of the owner.

Thus property taxes were sustained against intangible personal property belonging to nonresidents in,

> *Tappan* v. *Merchants Nat. Bank*, 10 Wall, 490;

Bristol v. *Washington Co.*, 177 U. S., 133;
Liverpool & L. & G. Ins. Co. v. *Orleans* Assess. 221 U. S. 346;
New Orleans v. *Stempel*, 175 U. S., 309;
Scottish Union & Nat. Ins. Co. v. *Bowland*, 196 U. S., 611;
State Board of Assessors v. *Comptoir Natl.*, 191 U. S., 388;
Rogers v. *Hennepin Co.*, 240 U. S., 184;
Metropolitan Life Ins. Co. v. *New Orleans*, 205 U. S., 395.

But in each case where a tax has been sustained on the ground that the property subject to tax had a taxable situs in the State, while the owner was a non-resident, there were present two factors which have been universally recognized as essential to jurisdiction—first, that there must be in existence some definite and specific property, and second, that that property must in a real sense have a situs in the taxing state.

Thus in *State Tax on Foreign held Bonds*, 15 Wall, 300, it was held that a State could not tax the interest on bonds issued by a domestic corporation owned by a non-resident and possessed outside the State. The Court said:

> "We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State. Even where the bonds are held by residents of the State the retention of the company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax upon that species of property in the State. When the property

is out of the State there can then be no tax upon it for which the interest can be retained. The tax laws of Pennsylvania can have no extra-territorial operation; nor can any law of that State inconsistent with the terms of a contract, made with or payable to parties out of the State, have any effect upon the contract whilst it is in the hands of such parties or other non-residents. The extra-territorial invalidity of State laws discharging a debtor from his contracts with citizens of other States, even though made and payable in the State after the passage of such laws, has been judicially determined by this Court. A like invalidity must, on similar grounds, attend State legislation which seeks to change the obligation of such contracts in any particular, and on stronger grounds where the contracts are made and payable out of the State" (pp. 325-326).

In *Board of Assessors of New Orleans* v. *New York Life Ins. Co.*, 216 U. S., 517, *Metropolitan Life Ins. Co.* v. *New Orleans*, 205 U. S., 395 (*supra*) was distinguished. Both cases came up under the same statute, and each assumed to impose a local tax against a foreign corporation on the basis of an alleged debt from its policy holder. In the Metropolitan Case it was held that there was a real debt constituting a real property interest having a local situs. In the New York Life Case the tax was held illegal, because there was not a real property interest having a local situs. The case is stated in the headnote:

"Where a policyholder simply withdraws a portion of the reserve on his policy for which the life insurance company is bound, and there is no personal liability, it is not a loan

> or credit on which the company can be taxed as such, and this is not affected by the fact that the policyholder gives a note on which interest is necessarily charged to adjust the account. To tax such accounts as credits in a State where the company has made the advances would be to deprive the company of its property without due process of law."

In each of these cases the foreign corporation was engaged in business in the taxing State. Where, therefore, there existed actual property which could fairly be given a situs in the State, it was held taxable; but where the business did not give rise to a property right which could have such a local situs, no tax could be imposed. In other words, legal fiction could not be resorted to to sustain a tax on alleged property which did not in fact exist.

Applying the converse of the rule, the Court has held that a State having personal jurisdiction over a taxpayer may tax him upon all his property wherever located, provided it has not acquired a taxable situs elsewhere. Thus in

Hawley v. *Malden*, 232 U. S., 1,

the Court upheld a State tax against a resident of the State on shares of stock in foreign corporations which did no business or owned no property in the State.

In *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S. 54, a Kentucky tax against a resident upon money deposited in a Missouri bank was sustained upon the dual ground of a personal tax against the owner, and a property tax on the theory that *Mobilia sequuntur personam*.

And in *Southern Pacific* v. *Kentucky*, 222 U. S., 63, in holding that a domestic corporation may be taxed on all of its property which has not acquired a permanent situs elsewhere, the Court said:

> "Since, therefore, an artificial situs for purposes of taxation is not acquired by enrollment nor by the marking of a name upon the stern, the taxable situs must be that of the domicile of the owner, since that is the situs assigned to tangibles where an actual situs has not been acquired elsewhere. The ancient maxim which assigns to tangibles, as well as intangibles, the situs of the owner for purposes of taxation has its foundation in the protection which the owner receives from the government of his residence, and the exception to the principle is based upon the theory that if the owner, by his own act, gives to such property a permanent location elsewhere, the situs of the domicile must yield to the actual situs and resulting dominion of another government. Thus in *St. Louis* v. *Ferry Co.*, 11 Wallace, 423, 430, this Court, after referring to the taxing power of a State as extending to all persons and property within its territorial jurisdiction, said: 'In the eye of the law personal property, for most purposes, has no locality. * * * In a qualified sense it accompanies the owner wherever he goes, and he may deal with it and dispose of it according to the law of his domicile. If he die intestate, that law, wheresoever the property may be situate, governs its disposal, and fixes the rights and shares of the several distributees. But this doctrine is not allowed to stand in the way of the taxing power in the locality where the property has its actual situs, and the requisite legislative jurisdiction

exists. Such property is undoubtedly liable to taxation there in all respects as if the proprietor were a resident of the same locality. The personal property of a resident at the place of his residence is liable to taxation, although he has no intention to become domiciled there. Whether the personal property of a resident of one State situate in another can be taxed in the former, is a question which in this case we are not called upon to decide'" (pp. 68, 69).

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"The difficulties attendant upon the taxation of intangible property elsewhere than at the domicile of the owner have largely preserved the domicile of the owner as the proper situs for purposes of taxation.

"The legality of a tax is not to be measured by the benefit received by the taxpayer, although equality of burdens be the general standard sought to be attained. Protection and taxation are not necessarily correlative obligations, nor precise equality of burden attainable, however desirable. The taxing power is one which may be interfered with upon grounds of unjustness only when there have been such flagrant abuse as may be remedied by some affirmative principle of constitutional law." (p. 76).

The cases in which the Courts have held that choses in action may acquire a situs different from the residence of the owner are not in point. A chose in action has not yet been paid. The debtor has only promised to pay it, and its value depends on the promise of the debtor. The actual money to pay the chose in action is in the State where he resides.

But here the income is derived, paid, and re-

ceived. It is out of the State, and there is nothing in the State that represents it. It is a confusion of ideas to say that it is represented by the business done in the State. The non-resident who is employed by the plaintiff in the State of New York, and does work in the State of New York has nothing in the State representing the income. He is employed in Connecticut or in New Jersey, and comes into New York and does his work, and goes back. In most cases he receives the payment for the service rendered out of the State. But the place of payment is immaterial. The obligation to pay is clearly located at the common residence of the debtor and the creditor, and the situs of that chose in action is clearly not New York. An income is not a chose in action, but in possession; and in this case in fact, as well as in law, is at the residence of the owner.

Furthermore, the income tax is not assessed upon all money that comes into the recipient. It is only after the net amount has been determined after deducting from the gross receipts certain allowable expenses by way of deductions that the taxable amount is determined. Before that amount is determined and before any assessment can be laid thereon, most of the income, both gross and net, has been expended. The theory of a property tax is that it is a lien on the property taxed. Obviously the State cannot lawfully impose a tax lien upon property which is not itself in existence. The proposition is necessarily a contradiction in terms.

Here it is clear that the personal condition of the recipient and not the amount or character of the various payments made, constitutes and de-

termines the fact of income. It is, therefore, impossible to conceive of an income for purposes of taxation separated and distinct from the recipient of that income.

This condition is still further emphasized in the facts in the case at bar. The plaintiff's employees derive their income from the wages and salaries paid to them by the plaintiff. But the plaintiff is a non-resident of the State of New York. In the cases in which a chose in action has been held to have a taxable situs at the residence of the debtor, the decision was based upon the ground that the creditor could not enforce his debt except by virtue of the laws of the State imposing the tax.

But here the employees of the plaintiff need not resort to the courts of New York to enforce their claim for compensation for their personal services against the plaintiff. These employees are residents and citizens of Connecticut. The plaintiff is a Connecticut corporation. The claim for compensation will be made against it in Connecticut, and the employees are in no way affected by the laws of New York regulating or interfering with such compensation.

It is, we submit, clear that the income received by the plaintiff's employees from their personal services has no taxable situs as property in the State of New York, and that if this tax be regarded as a property tax, it is imposed upon property without the jurisdiction of New York, and is unconstitutional and void.

While this precise question is one of original impression the *ratio decidendi* of other cases in this court supports this conclusion. In *State Tax on Foreign Held Bonds* (*supra*), the tax was held void as an attempt to tax a subject outside the

jurisdiction of the State. The fact that the interest on the bonds was earned and paid in the State imposing the tax did not suffice to give the State jurisdiction to tax.

The recent case of *Deganay* v. *Lederer*, 250 U. S., 376, is not inconsistent with this position. There this Court sustained the Federal income tax levied on the income from American securities owned by a foreigner, the physical custody of which, however, was held by a resident of the United States, who had full power of attorney to sell and otherwise control the investment, and to collect the income therefrom. The question there presented was entirely of the income from property over which the United States had admitted jurisdiction, received by an agent who was also within the jurisdiction. That case is distinguishable from the one at bar because the income there was a tangible entity, having reference to the property producing it, without regard to the owner of the income, which income was received and collected by a resident agent. The distinction between a tax on the income from property and a tax on the income from occupations and professions was clearly pointed out in *Pollack* v. *Farmers Loan & Trust Co.*, 158 U. S., at pages 635 and 637.

Then too, the power of the Federal Government to tax foreigners rests upon an altogether different basis from that of the several States to tax the citizens of the sister States. The distinction between the rights of the citizens of the several States, which are assured by the Constitution, and those of foreigners, who may be completely excluded from the United States, is pointed out in *U. S.* v. *Bennett*, 232 U. S., 299, and

more specifically in *Railroad* v. *Collector* (100 U. S., 595, *supra*), where the Court said:

> "Whether Congress, having the power to enforce the law, has the authority to levy such a tax on the interest due by a citizen of the United States to one who is not domiciled within our limits, and who owes the Government no allegiance, is a question which we do not think necessary to the decision of this case.
>
> "The tax, in our opinion, is essentially an excise on the business of the class of corporations mentioned in the statute. * * *
>
> "It is very true that the act went further and declared that except when the company had contracted otherwise it might deduct this tax from the amount due the bondholders. And where the bondholder was subject to Congressional legislation by reason of citizenship, residence or *situs* of the property taxed, it was within the lawful power of Congress to do so. Whether, as a question of international law, this declaration would relieve the corporation from the obligation to pay its foreign bondholder the full sum for which it contracted, we need not discuss, for this court, on all such subjects, is bound by the legislative and political departments of its own government" (pp. 597, 598, 599).

(4) The provisions of the statute taxing non-residents cannot be sustained as imposing a privilege or license tax.

The recent decisions of this Court seems to establish definitely the proposition that a tax on net income is not to be treated as a tax on the business from which the gross income is derived; that is as an occupation or business tax. In *Peck & Co.* v. *Lowe*, 247 U. S., 165, it was argued that "a tax on income is a tax on the source from which the income is derived," and since the income in controversy was income from shipping goods to foreign countries, the tax conflicted with the provision prohibiting any tax on articles exported from any State. This Court pointed out that the tax was laid generally on net incomes, and said:

> "The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins" (p. 175).

In the case at bar the tax is not on the gross salary or gross income but is a tax measured by the net income after deductions of expenses and losses and after the recipient is free to use it as he chooses.

In *U. S. Glue Co.* v. *Oak Creek*, 247 U. S., 321, the Court held that a State may include in the computation of net income under a general income tax law the net income derived from transactions in interstate commerce, saying:

> "It is settled that a State may not directly burden interstate commerce, either by taxation or otherwise. But a tax that only indirectly affects the profits or returns from such commerce is not within the rule" (p. 326).

In these cases the distinction was drawn between a tax on net income depending solely upon jurisdiction over the person of the taxpayer, and a business or occupation tax depending upon jurisdiction over the source of the income. The *ratio decidendi* of these cases classifies the New York tax here in question as a subjective tax, depending for its validity upon jurisdiction over the person of the taxpayer, and forbids its classification as a business or occupation tax.

This statute does not purport to impose a privilege, occupation or license tax. It imposes on nonresidents a tax on income from property and business and occupations indiscriminately. There is no attempt to prohibit or require a fee for the transaction of business, but the statute taxes the persons enjoying net income after the year's business has been transacted, the receipts, expenses and losses experienced and the prescribed computations made.

And to construe this tax as a privilege or license tax would be to make the statute unconstitutional, because it would then rest upon the assumption that what was done depends upon the State's consent and the State of New York has no power to exclude citizens and residents of other States generally from transacting any business in the State of New York.

Sault Ste. Marie v. *International Transit Co.*, 234 U. S., 333, at page 340;

Provident Savings Life v. *Kentucky*, 239 U. S., 103;
Allgeyer v. *Louisiana*, 165 U. S., 578;
Truax v. *Raich*, 239 U. S., 33.

Section 351 (Rec., p. 28) of the law imposes a tax "upon every resident of the State, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined." As to residents of the State, the tax is imposed upon all income that they receive, regardless of whether the State has jurisdiction over the source of the income or not. A resident of the State, owning real property in Connecticut from which he derives a net income in the shape of rentals, pays a tax upon this income to the State of New York. Both the phraseology of the law imposing the tax upon the person of the resident, as well as the scope of the sources of the income subject to tax, show beyond question that as to residents of the State the tax is a purely personal tax.

As to non-residents, the language of Section 351 is: "A *like* tax is hereby imposed and shall be levied, collected and paid * * * upon and with respect to the entire net income as herein defined * * * from all property owned and from every business, trade or occupation carried on in this State by natural persons not residents of the State." The tax on non-residents is defined as a "*like*" tax as that imposed upon residents. Since without dispute the tax on residents is a personal tax, there is here a formal legislative declaration that the tax on non-residents is also "a like tax,"—that is, a personal tax. This is expressly conceded by the appellant at page 10: "It is obvious that

the tax on residents and non-residents is the same, regardless of the different phraseology so far as both are taxed."

The personal tax on residents is levied and collected "upon and with respect to his entire net income as herein defined," and the tax on non-residents is also levied and collected "upon and with respect to the entire net income as herein defined." The fact that with regard to non-residents certain sources of income outside of the State are excluded from the computation of the entire net income, which are included in the computation as affecting residents, seems not to change the nature of the tax itself. It is clear that the nature of the tax cannot be determined by the subjects excluded, but rather by the imposition of the tax on such subjects as are affected. Paraphrasing Section 351 of the act, a personal tax is imposed upon residents and non-residents of the State, the tax to be measured in both cases by the net income received as hereafter defined, the definition of what is included in the net income varying as between the residents and the non-residents.

Furthermore, there is no distinction or difference made in the tax against the income of non-residents derived from property owned in the State and from every business, trade, profession or occupation carried on in the State. Obviously a license tax could not lawfully be exacted from a non-resident because of the ownership of property in the State. The property in the State can be taxed, being subject to the State's jurisdiction, but no license fee can be imposed upon a non-resident for the privilege of owning such property. The tax as to property must be a tax on the property

within the jurisdiction. The fact that the income from property and from business and occupations is grouped together in one sentence without separation is further indication that the tax is in fact a personal tax against the owner of the income, and is not intended to be a license fee for the privilege of doing something that the State, under the police power, can prohibit.

If this tax could be regarded as a license or occupation tax, it would impose a direct burden on interstate commerce.

The plaintiff is engaged extensively in interstate commerce, and its employes are engaged in New York in large part in the furtherance of such interstate commerce. The same is true of many non-residents engaged in whole or in part of their working time in the State of New York. Some of the plaintiff's employes are travelling salesman, who come into New York to solicit orders for goods for shipment into New York from Connecticut. Under the regulations of the Comptroller annexed to the complaint, the earnings of such travelling salesmen while engaged in selling goods in interstate commerce are expressly subject to this tax. So construed the tax would be necessarily a direct burden upon interstate commerce and unconstitutional.

> *State Freight Tax Case*, 15 Wall, 232;
> *Robins* v. *Shelby Co.*, 120 U. S., 489;
> *Asher* v. *Texas*, 128 U. S., 129;
> *Laloup* v. *Port of Mobile*, 127 U. S., 640;
> *Walling* v. *Michigan* 116 U. S., 446.

(5) The statute cannot be sustained on the theory that the State of New York has in fact power to collect the tax.

The brief of the Attorney General seems to proceed upon the syllogism: The power of a State to enforce its taxes measures its jurisdiction; in the present instance, the State of New York has power to enforce a tax on the net incomes of non-residents; and, therefore, the tax is constitutional.

We respectfully deny the premises. It is not going too far to say that in every case in which this Court has held unconstitutional a State law imposing a tax on persons or property outside its jurisdiction, the State had power to enforce the tax, because otherwise the case would not have been brought. For instance, in *Board of Assessors of New Orleans* v. *New York Life Insurance Co.*, 216 U .S., 517, and *New York, Lake Erie & Western Railroad* v. *Pennsylvania*, 153 U. S., 628, the corporations were authorized to do business in the State, and the State had power (in the sense in which we understand the word is here used) to collect from them and tax up to the limit of their resources in the State. So, in, say, *Morgan* v. *Parham*, 16 Wall, 471 or *Louisville, etc. Ferry Co.* v. *Kentucky*, 188 U. S., 385, the State had power to seize the vessels temporarily within its territorial jurisdiction but that did not give it jurisdiction to impose the taxes.

As between nations, the proposition that power to collect is the test of right to tax may be correct. Just as foreigners may be completely excluded from the United States (*United States*

v. *Bennett*, 232 U. S., 299), so anything that the United States can in fact seize it may perhaps tax. That, as said by this Court in *Railroad* v. *Collector*, 100 U. S., 595, "we need not discuss, for this Court on all such subjects is bound by legislative and political departments of its own government" (p. 599). But the power of the individual States of the Union is limited by the United States Constitution. One of the limitations is that a State cannot take property without due process of law. And "no principle is better settled" than that taxation by a State of persons or property outside its jurisdiction and within the jurisdiction of another State constitutes a taking of property without due process of law.

The second premise that the State of New York here has power to collect the tax on the net income of non-residents, seems equally erroneous. The non-resident, not being within the territorial jurisdiction of the State, cannot personally be reached. His net income, owned and enjoyed in Connecticut, is out of reach of the State of New York exactly as his real estate in Connecticut is. Even his gross salary, for instance the money paid to him in Connecticut by a citizen of Connecticut, has never been within the territorial limits of the State of New York. The State has no power to reach him or his net income. What it has attempted to do here is to make a third party, the appellee, who is doing business and owns property in New York, personally liable for an amount in excess of the net income, trusting to appellee's relations with the non-resident to exert sufficient force to induce the non-resident to "make, under oath, a complete return of his gross income, both within

and without the State" (Sec. 367, Rec., p. 37), and thus get at the amount of his taxable "net income" and collect it. The resort to the imposition of personal liability on a third party for a percentage of the gross salary as the only means of enforcing a tax on non-resident's "net income" seems to confirm the conclusion that the non-resident and his net income are not within the jurisdiction of the State, and the attempt to tax him on it is, accordingly, not due process of law.

(6) The tax on non-residents cannot be sustained on any theory that the State of New York protects their net income.

It is suggested that the State's protection is a justification of taxation. But that would not justify this tax on non-residents. The employee of the appellee, a citizen and resident of Connecticut, receiving his salary from a Connecticut corporation in Connecticut, is not aided by the State of New York in the enjoyment or protection of the net income computed therefrom. He and his income are protected by the State of Connecticut.

The State of New York has afforded protection to all persons and things temporarily or permanently within the State. The existence of its protection may have enabled many citizens and residents of other States to possess and enjoy much of their real and personal property located in such States. But the protection which justifies taxation is not merely some antecedent protection suggesting the propriety of gratitude. The State of New York affords no more protection to the net income of a citizen and resident of Connecticut than it affords to his real estate there. He might perhaps properly be grateful to the State of New York for protection which enabled him to secure either, but his protection in the enjoyment of the thing to which the tax refers, is in both instances afforded by the State of Connecticut. Protection is not synonymous with jurisdiction, and no consideration of having afforded protection can give the State of New York a right to tax non-residents or their property outside the jurisdiction of the State.

POINT III.

The provisions of the statute taxing non-residents are unconstitutional because they discriminate against citizens and residents of Connecticut and New Jersey.

The opinion of Judge Knox in the Court below proceeds upon the ground that since this statute discriminates against citizens of other states and in favor of citizens of New York, it conflicts with the "privileges and immunities" clauses of the Fourteenth Amendment and Article IV. of the Constitution and that made it unnecessary to consider other grounds. (Rec. p. 60, *et seq.*) We here note **(1)** the more important of the cumulative discriminations in fact made and then **(2)** the application of the constitutional provisions thereto.

(1). The statute imposes a materially higher tax upon non-residents than upon residents.

(a) Section 362 (Rec., p. 33) of the Statute provides certain exemptions: $1,000 for a single person $2,000 for the head of a family and $200, for each dependent; and these exemptions are limited to residents. Concretely, this means that of two persons employed by the appellee at the same task in the State of New York, and each receiving say $2,000, one living with his wife in New York pays no tax and the other living with his wife in Connecticut pays $20.

The provision is not that the non-resident shall be entitled to such proportion of the exemptions as his gross income from the State of New York bears to his total income. The State of New York attempts to tax all the income of the non-resident that has any possible connection with the state, with an important exception based on preserving a market for New York securities. It declares that one man shall pay a tax, or more tax, and another who does and has precisely the same, shall go free, or pay less, according to state lines and nothing else.

(b) Section 360, Paragraph 5 (Rec., p. 32), provides that a resident may deduct losses incurred in any transaction entered into for profit though not connected with the trade or business "but in the case of a tax payer other than a resident of the state, only as to such transactions within the state."

This means, concretely, that if two employees of the appellee, each receiving a salary of $5,000.

a year, together enter into a business venture in Philadelphia resulting in a loss to each of say $5,000. during the year, one deducts his loss and pays no tax, and the other cannot deduct any part of the loss (because the business transaction was not within the state) and pays a tax of $50.

(c) Section 360, Paragraph 6 (Rec., p. 32), provides for the same discrimination with regard to the losses of a slightly different character. The resident may deduct losses for fires, etc. of property not connected with the trade or business. The non-resident cannot deduct such losses unless the property is within the state.

To illustrate again, two employees of the complainant sustain losses of property through the burning of their homes. One, residing in New York, may deduct the amount of his losses, the other residing in Connecticut, can deduct nothing and pays the full amount of the tax.

(d) Section 360, Paragraph 11 (Rec., p. 33), provides as to various deductions from gross income in computing net income

> "In the case of a taxpayer other than a resident of the state the deductions allowed in this section shall be allowed only if, and to the extent that, they are connected with income arising from sources within the state; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the state shall be determined under rules and regulations to be prescribed by the Comptroller."

To illustrate again, of two employees of the complainant doing the same work and receiving

the same salary, and owning their homes, one, residing in New York, deducts his real estate taxes under Paragraph 3, while the other, residing in Connecticut, is not allowed to deduct his like tax but pays on the full amount to the State of New York. Or one finds that a debt due from a transaction is worthless and charged off and deducted under Paragraph 7, while the other, sharing perhaps in the same credit, cannot deduct his loss and pays the full tax.

(e) Section 366 (Rec., p. 36), provides that "every withholding agent shall deduct and withhold two percentum from all salaries" etc. of non-residents. The tax imposed by Section 351 (Rec. p. 28) is at the rate of one per cent. on net incomes up to $10,000; two per cent. between $10,00 and $50,000; and three per cent. in excess of $50,000. Upon the advice of the Attorney General, the Comptroller announces in his regulations (Rec., p. 51) that withholding agents (contrary to the words of the statute) shall deduct and withhold only one per cent. on the first $10,000.

It seems apparent that the law as written requiring the withholding of two per cent is unconstitutional. There is no other law; and there seems to be no power in the Attorney General or the Comptroller to require the appellee to withhold any other per cent.

There are other inequalities such as the requirement that the non-resident lose the enjoyment of his money by having it withheld on an average of nine months before the resident is required to pay any taxes (Art. 262, Rec. p. 51, Sec.

371, Rec. p. 38) and the placing of a burden on the non-resident to recover back from the percentage of his gross salary paid the state, the amount justified by his deductions, (Secs. 366, 53, 367, Rec., pp. 36, 37). But for present purposes it seems enough to note that the statute imposes cumulative discriminations and materially higher taxes solely according to state lines.

(2) The provisions operating to discriminate against appellee's non-resident employees conflict with Section 2 of Article IV of the Constitution and the "privileges and immunities" clause of the Fourteenth Amendment.

The Bill of Complaint recites that appellee's non-resident employees are citizens of the States of Connecticut and New Jersey wherein they reside (Rec., p. 2b). As pointed out in the opinion below (Rec. p. 64) by the Fourteenth Amendment, it is declared that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." We are, accordingly, dealing here with a case wherein the rights of citizens of Connecticut and New Jersey are involved.

Those citizens are entitled under the Constitution to go freely into the State of New York and work there on terms of equality, as to taxation, with the citizens of New York. The citizen of another State has no vote or representation in New York, and it may be to the interest of the State of New York so to discriminate against him as to induce his taking up his residence in New York and thus become a citizen thereof. The Constitution alone affords any protection against such discrimination. Its first purpose was "to form a more perfect Union." Section 2 of Article IV was designed to carry out that purpose. "It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this," (*Paul* v. *Virginia*, 8 Wall, 168, 180). Because it

has to do with promoting "a more perfect Union" and constituting the citizens one people, it seems that this freedom from discriminatory legislation properly belongs to the individual as a citizen of the United States and is also within the "privileges and immunities" clause of the Fourteenth Amendment.

There can be no doubt that this statute in fact "cannot operate without depriving citizens of other States of privileges and immunities which are open to citizens and residents of New York" (Rec., p. 63). The statute uses the term "resident," but its operation is necessarily to defeat the constitutional right of citizens of other States, and the purposes sought to be attained by the Constitution. We respectfully refer to the decisions quoted and cited in the opinion of the Court below (Rec., pp. 60, *et seq.*) and submit that the Court accurately summarized these aspects of the case when, after quoting from the Fourteenth Amendment, it said:

> "It is this provision of the Constitution along with the second section of Article IV and the Interstate Commerce Section of our fundamental law that have been largely responsible for the community of interest, the unanimity of purpose, the united effort, and the magnificent accomplishments of our people. If now, under one pretence or another, the States are to erect economic and taxation barriers along their boundaries, it is but a question of time when the citizens of the various States will for all practical purposes be burdened with the disabilities of alienage, and this would be intolerable" (Rec., p. 64).

But it is said that classification is not forbidden by the Constitution, the classification here is residence and the imposition of a higher tax on nonresidents than on residents is a reasonable exercise of the power of classification. Some of the difficulties with that suggestion seem to be:

(a) A statute which in fact operates to defeat rights secured by the Constitution cannot be justified by invoking the necessity of classification in taxation or by the fact that the words of the Constitution do not appear in the statute. In *Chalker* v. *Birmingham & N. W. Ry. Co.* (249 U. S., 522) the Court said:

> "The power of a State to make reasonable and natural classifications for purposes of taxation is clear and not questioned; but neither under form of classification nor otherwise can any State enforce taxing laws which in their practical operation materially abridge or impair the equality of commercial privileges secured by the Federal Constitution to citizens of the several States.
>
> "Excise taxes, it is everywhere conceded, may be imposed by the States, if not in any sense discriminating; but it should not be forgotten that the people of the several States live under one common Constitution, which was ordained by established justice, and which, with the laws of Congress, and the treaties made by the proper authority, is the supreme law of the land; and that that supreme law requires equality of burden, and forbids discrimination in State taxation when the power is applied to the citizens of the other States. Inequality of burden, as well as the want of uniformity in commercial regulations, was one of the grievances of the citizens under the Confederation; and the new Constitution was adopted, among other things, to remedy those defects in the prior system." *Ward* v.

> *Maryland*, 12 Wall, 418, 431; *Guy* v. *Baltimore*, 100 U. S., 434, 439; *Blake* v. *McClung*, 173, U. S., 239, 254; *Darnell & Son Co.* v. *Memphis*, 208 U. S., 113, 121.
>
> "As the chief office of an individual is commonly in the State of which he is a citizen, Tennessee citizens engaged in constructing railroads in that State will ordinarily have their chief offices therein, while citizens of other States so engaged will not. Practically, therefore, the statute under consideration would produce discrimination against citizens of other States by imposing higher charges against them than citizens of Tennessee are required to pay" (pp. 526, 527).

In this case the discrimination was not in words based upon citizenship. A tax was graded in amount according to whether or not the taxpayer had his principal office in Tennessee.

In *Travelers' Ins. Co.* v. *Connecticut*, 185 U. S., 364, the Court found that there was in fact no discrimination against non-residents in the taxation by the State, implying that if there had been, it would have been condemned.

There is no relevancy in cases where the State is dealing with a privilege which it may grant or withhold, such as those relating to foreign corporations doing business in the State, or succession taxes, or the nation's treatment of foreigners, because they do not deal with discrimination against persons having rights secured by the Constitution.

In *La Tourette* v. *McMaster*, 248 U. S., 465, it was held that the power of a State over insurance justified it in requiring brokers to be residents of the State or to have been licensed insurance agents of the State for at least two years, because the requirement provided appropriate means to benefit the insurer and insured, and was accordingly

a proper exercise of the police power. Its irrelevance is apparent when the statute here is considered as changed to resemble that insurance statute by supposing the State of New York to have required that no one should engage in any "business, trade, profession or occupation carried on in this State" (Sec. 351) except residents.

In brief, there is no case conflicting with the opinion of Judge Knox in the Court below, and it has been directly confirmed by *Chaulker* v. *Birmingham, etc., Co.* (*supra*, 249 U. S., 522).

That some of the cumulative discriminations are in deductions does not take them out of the rule. In *People* v. *Weaver* (100 U. S., 539), a New York statute permitted a taxpayer to deduct his debts from the valuation of all his personal property, except so much thereof as consisted of national bank shares. In holding this illegal the Court said:

> "We are, therefore, of opinion that the statute of New York, as construed by the Court of Appeals, in refusing to plaintiff the same deduction for debts due by him, from the valuation of his shares of national bank stock, that it allows to those who have moneyed capital otherwise invested, is in conflict with the Act of Congress, and the judgment of that court will be reversed and the case remanded for further proceedings in conformity to this opinion" (pp. 546, 547).

So, in *Sprague* v. *Fletcher*, 69 Vt., 69, it was held that a statute allowing residents to deduct the amount of their debts from their taxable property but denying the same privilege to non-residents, was unconstitutional.

(b) In addition to that and dealing with the "equal protection of the laws," classification between residents and non-residents, accompanied

by different treatment of the two classes, seems to present exceptional aspects from the point of view of our constitutional law. The non-resident is not a voter and lacks the protection which that power secures to the resident. On the other hand, it is generally to the selfish interest of a State to discriminate against non-residents, because that tends to encourage residence within the State, and a consequent increase in its taxpayers and prosperity. In the present instance, for example, if this law could be sustained, of two houses suitable for rental to persons earning in New York City a salary of $2,000, one should rent for $15 more than the other, solely because located in New York instead of Connecticut, other things being equal, since the person living in the house in New York would save at least $20 in taxes. For the reasons thus suggested, discrimination against non-residents seems to require more justification than discrimination between classes both having a voice in the government or discrimination which cannot affect the commercial or political integrity of the nation.

The discrimination here is plainly unreasonable. It is obviously unreasonable to make one man pay $20 in taxes and another nothing in taxes, when both do and have precisely the same. The only suggestions which we have seen to the contrary are two:

One is that since the non-resident pays New York only upon income from within that State and the resident pays on all his income, the total amount of payment to New York may be greater by the resident. But that is merely to say that because the State of New York cannot reach all the property of a non-resident, it is justified in taxing such part as it can reach, at a rate high enough

to make the non-resident's total payment to New York equal the total payment of the resident. If a State imposes a higher rate of tax on the particular kind of property within its jurisdiction, because owned by a citizen and resident of another State, the injustice is not diminished by the fact that the State has jurisdiction over the person of its residents and so can impose larger aggregate taxes on him, or by the assumption that other States impose no taxes on their residents.

The other suggestion is that some day other States may impose like taxes of just the same amounts with just the same provisions and the injustices will then be relieved by the balance. That seems plainly too theoretical and speculative for consideration. And it does not meet the existing wrong.

As pointed out in the Court below, the discrimination here is a matter of real "importance to the thousands of persons, residents and citizens of adjoining States, who daily come into this State and here contribute to its welfare and prosperity" Rec., p. 62). The appellee's employees not large owners of real estate, are the taxpayers in the case at bar. It is matter of common knowledge or, as the Court below puts it, "the personal knowledge of us all" (Rec., p. 63), that thousands of the taxpayers they represent are without income except what they earn by their work. To attempt to justify the actual hardship of the discrimination against them by imagining each possessed of a large income from other sources is to depart widely from actualities.

Finally, this argument as to reasonable classification, even if accepted, would not justify this statute. It would, at most, justify only a tax allowing non-residents such proportion of the ex-

emptions and deductions allowed residents as their income from sources within the State of New York bears to their total income. It does not alter the conclusion that the discriminatory tax here is unconstitutional and void.

The misconception of the power of the State over citizens and residents of other States of the Union, which is found in these discriminations, is further illustrated by Section 363 (Rec., p. 34) of the statute, which provides, in substance, that if other States retaliate, the State of New York will grant such credits to non-residents as other States may grant to residents of New York.

This seems to proceed upon the notion that the State of New York may act as a wholly independent sovereign, without regard to the obligations of the Federal Constitution. It seems plainly to embrace three things: (a) A recognition of the fact that this statute imposes an onerous tax on residents of neighboring States, which will logically result in those States imposing like taxes on residents of New York; (b) an offer to mitigate the hardship if the residents of New York are similarly attacked and reciprocal consideration is shown them by the neighboring State, and (c) the maintenance of that hardship as against residents of States which do not retaliate and accept the reciprocal consideration tendered.

Thus, if New Jersey and Connecticut retaliate by taxing residents of New York, and New Jersey alone accepts this offer of reciprocal consideration, we shall have New York imposing one tax or rate of tax upon its residents, another tax or rate of tax on residents of New Jersey, and a third upon residents of Connecticut and other States.

This seems plainly in the direction of abolishing the Federal Constitution and erecting each State into an independent sovereignty, ready to

enter into treaties with the other States as to how their citizens shall be treated. It plainly conflicts with the first object of the Constitution, "to form a more perfect Union," and the provisions of Article IV, Section 2, and the Fourteenth Amendment.

Since the New York Income Tax Law thus exceeds the jurisdiction of the State and deprives citizens of other States of rights secured to them by the Federal Constitution, the decree should, we submit, be affirmed.

Respectfully submitted,

LOUIS H. PORTER,
ARCHIBALD COX,
Counsel for Appellee.

[3799]

APPEAL PRINTING CO., 77 THAMES ST.

In the Supreme Court of the United States

OCTOBER TERM, 1919.

No. 548.

EUGENE M. TRAVIS, as Comptroller of the State of New York,
Appellant,

against

THE YALE & TOWNE MANUFACTURING COMPANY,
Appellee.

MOTION

For leave to file a brief and to take part in the oral argument as amicus curiae

and

BRIEF

In support of the appeal from the judgment herein, made in behalf of William P. Burr, Corporation Counsel of The City of New York, Chairman, William S. Rann, Corporation Counsel of the City of Buffalo, and William J. Wallin, Mayor of the City of Yonkers, as a Committee of the Conference of Mayors and other City Officials of the State of New York.

Submitted by:

LAURENCE ARNOLD TANZER,
WILLIAM P. BURR,
WILLIAM S. RANN,
WILLIAM J. WALLIN,

As amici curiae on behalf of Conference of Mayors and other City Officials of the State of New York.

(17944) M. B. Brown Printing & Binding Co., New York

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MOTION.

Now comes Laurence Arnold Tanzer, an attorney and counsellor of this Court, and represents that he is counsel for the Conference of Mayors and other City officials of the State of New York, composed of Mayors, Corporation Counsels, Comptrollers and other officials of the cities of the State of New York, and that he has been requested to make this application by William P. Burr, Corporation Counsel of The City of New York, Chairman; William S. Rann, Corporation Counsel of the City of Buffalo, and William J. Wallin, Mayor of the City of Yonkers, a Committee of the said Conference, duly appointed by said Conference for the purpose

of presenting to this Court herein argument in support of the constitutionality of the New York Income Tax Law.

That the cities of the State of New York represented in said Conference are vitally interested in the question of the constitutionality of the New York Income Tax Law which is involved in this case, inasmuch as under Section 382 of said Law (Chapter 627 of the Laws of 1919) 50 per cent. of the proceeds of the taxes thereby imposed is to be paid to the treasurers of the several counties of the State for distribution among the cities and towns of the State, and an affirmance of the judgment of the Court below in this case would operate to deprive them of a substantial part of the said revenue.

Therefore he prays leave to file the accompanying brief as *amicus curiae* in support of the appeal from said judgment, and to take part in the oral argument.

Counsel for appellant and for appellee herein have by written consent submitted herewith waived notice of this application, and the Attorney General of the State of New York, as counsel for the appellant herein, joins in this application as is set forth in the said written consent.

SUBJECT INDEX.

TABLE OF CASES CITED.

BRIEF.

Statement.

The facts are set forth in the statement of the case in the brief of appellant submitted by the Attorney General of the State of New York.

That brief also contains arguments and authorities in support of the statute in question, repetition of which will be avoided so far as practicable.

The particular grounds of attack by plaintiff on the constitutionality of the act do not clearly appear from the vague allegations of the bill of complaint. From appellee's brief, however, it appears that the act is claimed to be unconstitutional on the following grounds (set forth in the order in which they are discussed in this brief):

(1) That it discriminates against non-residents and thereby deprives them of the equal protection of the laws and denies them the privileges and immunities of citizens of the State of New York. This was the ground on which the statute was held unconstitutional by the Court below.

(2) That it violates the fourteenth amendment by attempting to impose on non-residents a tax beyond its jurisdiction.

(3) That the withholding provisions of the statute are unconstitutional.

We contend that the statute is a valid and constitutional enactment:

(1) It contains no unconstitutional discrimination against non-residents. The differences between them arise from a difference in the base of the tax, which difference in base is itself compelled by the difference in the extent of the state's juris-

diction over residents and over non-residents, and therefore cannot be said to be an arbitrary discrimination. The difference in the exemptions and deductions corresponds to this difference in base and is the result of an effort to equalize, so far as possible, the relative positions of the resident and the non-resident. Non-residents are not in fact discriminated against; whatever hardships may arise are due to the particular circumstances of individual taxpayers. The attack is really on the policy of the law which is not a matter upon which the courts can be called upon to pass.

(2) The tax on the incomes of non-residents from property and business within the state does not exceed the power of the state. A state in the exercise of its power to tax all persons, property and business within its jurisdiction can tax non-residents on their property and business within the state and can measure the tax by the income therefrom. The validity of the tax depends not on its theoretical classification, but on its practical operation and effect. A denial of this power to the states would be a serious impairment of their taxing power.

(3) The withholding provisions are a mere measure of tax enforcement operating only within the territory of the state and well within its power.

POINT I.

The distinction made by the act between residents and non-residents is not arbitrary or unreasonable, but rests on the difference not only reasonable but inherent and inescapable between the limited jurisdiction of the State over non-residents and its plenary jurisdiction over residents.

1. The base of the tax is different and narrower in the case of non-residents than in the case of residents.

The alleged discrimination against non-residents consists in the failure to allow non-residents (a) the personal exemption of $1,000 to a single person and $2,000 to a married person, in addition to $200 for each dependent, allowed to residents by Section 362; (b) the general deductions from income allowed by Seection 360, except when they arise from losses of property within the state or are connected with income arising from sources within the state (sub-div. 6, 11).

This limitation of the exemptions and deductions allowed to non-residents has a direct correspondence with the difference in the base of the tax on non-residents as compared with the base of the tax on residents.

This difference clearly appears from Section 351, imposing the tax.

The first sentence describes the tax on residents as follows:

> "A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually *upon and with respect to his entire net income as herein defined* at rates as follows: One per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars."

The second sentence describes the tax on non-residents as follows:

> "A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, *upon and with respect to the entire net income as herein defined,* except as hereinafter provided, *from all property owned and from every business, trade, profession or occupation carried on in this state* by natural persons not residents of the state."

The tax is thus in both cases an income tax properly described as "a like tax" in its *nature;* but in its measure or *base* the tax on non-residents rests on a much more limited and narrow base than the tax on residents and, as we shall show below, necessarily so.

The tax on residents is based on their *entire net income from all sources,* or what is known as a *general income tax.* The tax on non-residents is a tax only on their net income *derived from sources within the state,* or what is known as a *special income tax.*

This difference in base clearly appears throughout the statute. Section 351 imposes a tax on the resident on "his entire net income as herein defined," and on the non-resident on "the entire net income as herein defined, except as hereinafter provided," from sources within the state. Subject to the limitation to sources within the state, the statute uses the common term "the entire net income as herein defined."

The reference is to Section 357, which defines "net income" as "the gross income of a taxpayer less the deductions allowed by this article."

The "gross income," which is the ultimate base, is defined in Section 359. The definition follows, in a general way, the lines of the federal income tax law. The limitation in the case of non-residents is contained in subdivision 3 and is as follows:

> "In the case of taxpayers other than residents, gross income includes only the gross income from sources within the state, but shall not include annuities, interest on bank deposits, interest on bonds, notes or other interest-bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article."

The non-resident as a class thus pays on a narrower base and therefore pays a lesser tax in the following respects:

(a) He is taxed only on his net income from sources within the state, whereas the resident pays on his entire net income from every source within and without the state.

(b) He is exempted from tax on income even from sources within the state where those sources consist of annuities, bank deposits, notes or other interest-bearing obligations or dividends from corporations not a part of income from business carried on within the state.

(c) He receives a further special exemption if the state of his domicile taxes him on his entire income, in the form of a credit of the proportionate part of the tax paid to his home jurisdiction; this is provided for in Section 363, which will be referred to again below.

That the lesser exemptions and deductions allowed to non-residents correspond to the lesser taxes which non-residents are called upon to pay will be shown below. At this point we wish to emphasize the difference in the base of the tax as between residents and non-residents and to point out its character and that it necessarily follows from the difference in the jurisdiction of a state over residents and non-residents. The difference between the general income tax imposed on residents and the special income tax imposed on non-residents is described as follows in an article by Professor Edwin R. A. Seligman, a leading authority on the subject of taxation, and especially of income taxation, who acted as expert adviser to the legislative committee which drew the law, on "The Taxation of Non-Residents in the New York Income Tax," published in the Bulletin of the National Tax Association for November, 1919, page 40, at pages 45, 46:

> "A personal tax is a tax levied on the person as such; an impersonal tax is a tax levied on the thing rather than on the person. When

the land tax is assessed, as in the state of New York, upon the plot of ground rather than upon the person who owns the land, it becomes an impersonal tax, or what the lawyers call a tax *in rem*. In other words, although of course someone must pay the tax, the law pays no attention to the personal situation of the owner; the tax is imposed upon the land, irrespective of how much the owner may have borrowed upon it. So in the same way, the tax may be levied upon capital or personal property, irrespective of who owns it; or the tax may be levied upon a business irrespective of who carries it on. As opposed to these impersonal taxes, we have the personal taxes; and as the wealth of the individual may be measured in terms either of property or of income, the personal taxes are either property taxes or income taxes. What we have to deal with here are specifically income taxes.

The income tax, however, may either be a general income tax, as in the United States, or it may consist of a series of special income taxes, *i. e.,* taxes on the income from special sources. * * *

These special income taxes may be of several kinds. In the first place, there may be a tax on the income either from the ownership of land or, where there is a distinction between ownership and cultivation, from the cultivation of land. In the next place, there may be a tax on the income from capital or what in this country is called personal property. This may take the form of a tax on the income either from tangible personalty or from intangible personalty, like securities. In the next place, we may have a tax on the income from professions or occupations, including taxes on wages as well as salaries. Finally, there may be a tax on the income from business.

These special income taxes are really akin to the impersonal taxes. It is true indeed

that, as in all other income taxes, an allowance may be made for the personal situation of the taxpayer, so far as concerns the question of indebtedness or of exemptions or abatements. But to the extent that they are assessed on the source of the income, or on the income with respect to the source, they partake to a certain extent of the nature of impersonal taxes levied on the source. Consequently when it is possible to divide a general income tax into its constituent elements and to levy special income taxes, these are more properly to be considered as impersonal, rather than personal, taxes.

The study of the problem of the taxation of non-residents must always bear in mind this distinction between general income and special income taxes, and between personal and impersonal taxes."

The courts even when not having under consideration the precise distinction now under discussion, have been called upon to consider the character, on the one hand, of a tax on the entire net income of an individual, without reference to the particular sources from which any portion of the income was derived, and, on the other hand, of a tax on the income from specific sources.

In *Pollock* v. *Farmers Loan & Trust Co.,* 157 U. S., 429; 158 U. S., 601, this Court had before it the question whether a tax on the income from land was a direct tax within the meaning of Article I, Section 9, of the Constitution. The determination of that question was made to turn to some extent on the question whether the tax then before the Court was to be regarded from the point of view of a tax on the income from specific property, or as a tax on a person's entire net income as such. In short, the distinction between a general income

tax and a special income tax was recognized by all the judges, the difference between the judges being as to which category the law then before the Court was to be regarded as belonging, for the purpose of applying the limitation of the power to lay direct taxes. In the opinion of the Court, by Fuller, C. J., the tax was regarded in the light of a special income tax. The Court stated, 157 U. S., 429, at page 581:

> "An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income. This law taxes the income received from land and the growth or produce of the land."

White, J., in his dissenting opinion, treated the tax as a general income tax.

On rehearing, this Court held that the tax in question was a direct tax, not only with respect to the income from real estate, but also with respect to the income from personal property. The majority of the Court had now apparently come to agree with the minority that the Federal Income Tax of 1894 was a general income tax and not a special income tax, but held that nevertheless it was a direct tax within the meaning of the federal constitution.

Fuller, C. J., speaking for the Court, said, 158 U. S., 601, at pages 629, 630:

> "The stress of the argument is thrown, however, on the assertion that an income tax is not a property tax at all; that it is not a real estate tax, or a crop tax, or a bond tax; that it is an assessment upon the taxpayer on account of his

money-spending power as shown by his revenue for the year preceding the assessment; that rents received, crops harvested, interest collected, have lost all connection with their origin, and although once not taxable have become transmuted in their new form into taxable subject-matter; in other words, that income is taxable irrespective of the source from when it is derived. * * *

"Admitting that this Act taxes the income of property irrespective of its source, still we cannot doubt that such a tax is necessarily a direct tax in the meaning of the Constitution."

The decision in the *Pollock* case has no bearing on the questions here presented; the opinions in that case are cited because they show that the distinction here involved between a general income tax and a special income tax was present in the minds of the Justices.

The same distinction was the subject of discussion in *London County Council* v. *Attorney General* (1901) Appeal Cases 26. As Lord Macnaghten there showed, at pages 37 and 38, the English income tax was under the Act of 1799 a general income tax which he describes as follows:

"For the purpose of the tax the income for the current year of persons to be assessed was ranged under four divisions: 'I. Income arising from lands, tenements, and hereditaments. II. Income arising from personal property and from trades, professions, offices, pensions, stipends, employments and vocations. III. Income arising out of Great Britain. IV. Income not falling under any of the foregoing rules.' In the form of return required from the taxpayer, which is given in a schedule, these four heads of income were represented by nineteen 'cases' of which the first fourteen fell under

> Division I. The taxpayer had to return his total income under each and all of these 'cases.' From this total income the taxpayer was allowed to make a great many of deductions under various heads also specified in the schedule * * * The total amount of deductions was to be subtracted from the total amount of income, and the difference was the 'income chargeable.'"

The opinion then states that this general return was found objectionable and that by the Act of 1803 the special income tax was substituted, which has continued in England in various forms to this day. Concerning this tax, the opinion states, at pages 37, 38:

> "By the Act of 1803, in lieu of a general return, particular returns of income from particular sources were required. That was the origin of the five schedules of charge with which we are now so familiar. It was not that there was any difference in kind between the income arising from the different sources. The alteration was made in order to avoid disclosure of the taxpayer's circumstances."

In the New York Income Tax Law there exist side by side a general income tax applied to residents, and a special income tax applied to non-residents—two taxes differing in the base on which they rest, by which they are measured, and to some extent in the method of enforcement.

These differences, as is shown below, rest on the essential difference between the jurisdiction of the state over residents and over non-residents respectively.

2. The difference in the base of the tax necessarily arises from the difference between the extent of a state's jurisdiction over residents and over non-residents respectively.

Over *residents* the state has plenary power of taxation. It can impose a general tax on residents based on their ability to contribute to the support of the government.

> *Kirtland* v. *Hotchkiss,* 100 U. S., 491, 499.
> *Hawley* v. *Malden,* 232 U. S., 1, 11.
> *Fidelity & Columbia Trust Co.* v. *Louisville,* 245 U. S., 54.

As was said in the case last cited, at page 58:

> "The present tax is a tax upon the person, as is shown by the form of the suit, and is imposed, it may be presumed, for the general advantages of living within the jurisdiction. These advantages, if the State so chooses, may be measured more or less by reference to the riches of the person taxed."

This opinion and the opinion in *Union Transit Co.* v. *Kentucky,* 199 U. S., 194, page 204, clearly show that the limitation preventing the state from imposing a property tax on tangible property physically situated without the state does not apply to a tax imposed on a resident and measured by his income.

Over *non-residents,* on the other hand, the state has no such general power of taxation. *State Tax on Foreign-held Bonds,* 15 Wall, 300.

That a state has power to impose a special income tax on non-residents based on their income

from sources within the state is argued under Point II, *infra*. For the present purpose it is sufficient to point out that a state does not possess over non-residents the same general power of taxation as it has over residents.

It follows that a state having power to impose a general income tax on a resident measured by his income from all sources and to impose on a non-resident only a special income tax, cannot tax them both on the same basis without either assuming to stretch its jurisdiction over non-residents beyond the limits of its power, or else giving up a large part of its legitimate power over residents. The former course would be legally impossible; the latter course would be an uncalled-for abdication of power and surrender of needed revenues, especially in the case of a creditor state like New York.

Professor Seligman says, in the article above referred to, at pages 46 and 47:

> "In the first place, the income tax might be regarded as a combination of special income taxes and everybody, resident and non-resident alike, might be taxed only upon that part of his income received from sources within the state. * * *
>
> "* * * this solution, however acceptable in a debtor state like Wisconsin, would be open to the objection adverted to above, that in a financial center like New York the proportion of income received from its inhabitants from sources outside New York forms the overwhelming percentage of the whole. A creditor state like New York would accordingly find such a solution fiscally inadmissible. The revenue which it would receive from the taxpayers would be insignificant when compared

> with the expenditures which it would be called upon to incur because of their presence within its borders. * * * We must, in a general income tax, bear in mind not alone income earned but income spent—not only the production side, but the consumption side of ability to pay. The Wisconsin principle is as defective in principle as it would in New York be hopeless in practice."

The State of New York was therefore compelled by the limits on its own jurisdiction to establish a different measure of tax over residents and over non-residents.

3. The difference in the base of the tax, being forced upon the state by reason of its limited jurisdiction, cannot be regarded as an arbitrary discrimination.

Directly in point is the decision of this Court in *Maxwell* v. *Bugbee,* 251 U. S., ——, decided October 27, 1919. The Court there overruled the contention that the so-called " ratio provision " of the New Jersey inheritance tax law was invalid because it differentiated between non-resident and resident estates by taxing the former on the transfer of property within the state at a rate based on the value of the entire estate within and without the state, whereas resident estates were taxed at a rate based only on the value of the property actually subject to the tax. The Court upheld the broad power of the state to make distinctions between different classes of cases, saying:

> " In making classification, which has been uniformly held to be within the power of the State, inequalities necessarily arise, for some

classes are reached, and others omitted, but this has never been held to render such statutes unconstitutional. *Beers* v. *Glynn*, 211 U. S., 477. This principle has been recognized in a series of cases in this court. *Board of Education* v. *Illinois*, 203 U. S., 553; *Campbell* v. *California*, 200 U. S., 87; *Keeney* v. *Comptroller of the State of New York*, 222 U. S., 525. It has been uniformly held that the Fourteenth Amendment does not deprive the States of the right to determine the limitations and restrictions upon the right to inherit property, but 'at most can only be held to restrain such an exercise of power as would exclude the conception of judgment and discretion, which would be so obviously arbitrary and unwarrantable as to be beyond the pale of governmental authority.' *Campbell* v. *California*, 200 U. S., 95."

The Court quotes the following from the opinion in *Keeney* v. *Comptroller of New York*, 222 U. S., 525, 535:

> "The validity of the tax must be determined by the laws of New York. The Fourteenth Amendment does not diminish the taxing power of the State, but only requires that in its exercise the citizen must be afforded an opportunity to be heard upon all questions of liability and value, and shall not, by arbitrary and discriminatory provisions, be denied equal protection. It does not deprive the State of the power to select the subjects of taxation. But it does not follow that because it can tax any transfer (*Hatch* v. *Reardon*, 204 U. S., 152, 159), that it must tax all transfers, or that all must be treated alike."

This Court then continues (*Maxwell* v. *Bugbee*, 251 U. S., ——):

> "In order to invalidate this tax it must be held that the difference in the manner of

assessing transmission of property by testators or intestates, as between residents and non-resident decedents, is so wholly arbitrary and unreasonable as to be beyond the legitimate authority of the State. We are not prepared so to declare."

The fact that the case cited dealt with an inheritance tax and the instant case is concerned with an income tax makes no difference in the principles involved. The power to tax inheritances, or to tax incomes, or any other subject of taxation being once established, the Fourteenth Amendment restricts the state's power of classification only to the extent of preventing such discriminations "as would exclude the conception of judgment and discretion, which would be so obviously arbitrary and unwarrantable as to be beyond the pale of governmental authority."

This Court held in *Maxwell* v. *Bugbee, supra,* that a difference in the measure of the tax based on the difference in jurisdiction over residents and non-residents cannot be considered such an arbitrary and unreasonable discrimination:

> "The resident testator or intestate stands in a different relation to the State than does the non-resident. The resident's property is usually within the ready control of the State, and easily open to inspection and discovery for taxation purposes, by means quite different from those afforded in cases of local holdings of non-resident testators or intestates. As to the resident, his entire intangible, and usually most of his tangible property, pay tribute to the State when transferred by will or intestacy; the transfer of the non-resident's estate is taxed only so far as his estate is located within the jurisdiction and only so far as it

> comes within the description of 'real property within this State, or of goods, wares, and merchandise within this State, or of shares of stock of corporations of this State, or of national banking associations located in this State.' * * *
>
> In our opinion there are substantial differences which within the rules settled by this Court permit the classification which has been accomplished by this statute."

This ruling operates just as directly to sustain the distinction made by the New York law between the general income tax on residents and the special income tax on non-residents as it did to sustain the precisely similar distinction made by the New Jersey law between a general inheritance tax on resident estates and a special inheritance tax on the transfer of property within the state of non-resident estates. It merely applies the principle that the difference in the jurisdiction of a state over residents and non-residents is a legitimate basis for classification, distinguishing between them in respect to taxation as in other subjects of legislation. That principle has been applied in a number of other cases cited at pages 21 and 22 of appellee's brief and was thus expressed in *District of Columbia* v. *Brooke*, 214 U. S., 138, 150:

> "The act in controversy makes a distinction in its provision between resident and non-resident lot owners, but this is a proper basis for classification. Regarded abstractly as human beings, regarded abstractly as lot owners, no legal difference may be observed between residents and non-residents, but regarded in their relation to their respective lots under regulating laws, the limitations upon jurisdiction, and the power to reach one and

not the other, important differences immediately appear."

To hold otherwise in a case like this would, it is submitted, be contrary to reason and common sense. It is only arbitrary and unreasonable discriminations that are forbidden. Such was the discrimination held invalid in *Chalker* v. *Birmingham & Northwestern Railway Co.*, 249 U. S., 522, where a license tax was imposed on construction companies of $25 if they had their chief office within the State and $100 if they had their chief office outside the State. This was held to be an arbitrary and unreasonable discrimination against foreign construction companies, and it was clearly so, because there was no valid reason for varying the amount of the tax according to the location of the principal office. The principle applied in that case, however, can apply only to discriminations intentionally adopted by the voluntary and arbitrary act of the State. But the difference in jurisdiction between residents and non-residents is a distinction forced on the State by the limitations of its very existence as a State; the State must submit to the distinction and to its consequences, whether it will or not. To say that a distinction which is thus forced upon the State constitutes a voluntary and arbitrary discrimination on its part is a plain contradiction in terms.

It follows that the difference in the base of the tax between residents and non-residents does not constitute an unconstitutional discrimination.

4. The difference in the exemptions and deductions granted to residents and non-residents corresponds to and bears a reasonable relation to the difference in the base of the tax.

As between the resident who is taxed on his entire income and the non-resident who is taxed only on his income from sources within the State, it would seem manifestly unfair that the non-resident paying the lesser tax should have the same exemptions and deductions as the resident.

The legislature of New York has adopted the principle that the non-resident should be allowed only such exemptions and deductions as correspond to the smaller base of the tax to which he is subject. The question here is whether that principle or its application is "so obviously arbitrary and unwarrantable as to be beyond the pale of governmental authority."

The differences complained of are of two kinds:

(a) The "personal exemption" and the exemption for dependents granted by Section 362. This is apparently granted on the theory of exempting from the tax on a person's *entire* income so much thereof as represents a minimum of subsistence. As it is only the resident who is taxed on his entire income, this minimum is deducted only from that income. The non-resident is not taxed on his entire income and consequently is not allowed this personal exemption. But he has, instead, an exemption not granted to the resident, of his entire income other than from sources from within the State. The fact that this exemption is enjoyed by him as of right and is not voluntarily granted to

him by the State does not alter the fact that the difference exists and is the occasion for the refusal of the personal exemption. The non-resident has, in addition, another exemption which is voluntarily granted to him by the State. If the State of his domicile taxes him on his entire net income (in which case that State may be expected to permit him a personal exemption corresponding to that granted by New York to its residents) the State of New York grants him in addition a credit against his tax payable to the State of New York of such proportion of the tax payable to his home State as is levied on his income taxable in New York (Section 363).

(b) The deductions granted by Section 360 are granted to residents irrespective of the sources of income to which they relate because the resident is taxed on his income from all sources; whereas a non-resident who pays tax only on income from sources within the State is allowed only such deductions as are connected with the income on which he is taxable.

The exemptions and deductions are both allowed with a view to the difference in the base of the tax so as to equalize, so far as is possible by a general rule, the relative positions of the non-resident and the resident.

The differences in question bear a direct and reasonable relation to the different situation of residents as compared with non-residents, as regards the jurisdiction of the State in relation to the tax. The legislative theory as outlined above is certainly not " such an exercise of power as would exclude the conception of judgment and discretion, which would be so obviously arbitrary and unwar-

rantable as to be beyond the pale of governmental authority."

It would seem elementary that where two classes of taxpayers are taxed on a different base there may legitimately be a difference in the exemptions and deductions allowed them.

A case directly in point is *Travelers Insurance Co.* v. *Connecticut,* 185 U. S., 364, where this Court upheld a statute of the State of Connecticut which taxed resident stockholders of corporations at the local rate for personal property tax and non-resident stockholders at a fixed rate, and at the same time allowed to resident stockholders, but not to non-resident stockholders, a deduction of so much of the value of their stock as was represented by real estate of the corporation taxable locally. A fuller analysis of the case with citations from the opinion may be found in pages 41 to 44 of appellant's brief.

Directly in point also is *Maxwell* v. *Bugbee,* 251 U. S., *supra,* sustaining the "ratio provision" of the New Jersey inheritance tax law, whereby non-resident estates taxable only on the transfer of property within the state are required to pay at graduated rates based on the value of the entire estate within and without the jurisdiction, while resident estates taxable on the transfer of the whole estate pay at rates based only on the value of the property subject to the jurisdiction.

The principle upon which a non-resident taxable only on his income from sources within the state is not granted the same exemptions and deductions as are allowed to a resident taxable on his entire net income is substantially the same as the principle on which the New York law makes an analogous

distinction in the taxation of personal property. A resident taxable on his entire personal property (excepting tangible property having an actual physical situs elsewhere) is allowed to deduct his just debts (Tax Law, Sections 8, 6); the non-resident taxable only on his capital invested in business in the state and on his tangible property located there (Section 7) is not allowed to deduct his debts. The reasons for this distinction were thus explained by Peckham, J., in *People ex rel. Thurber Whyland Company* v. *Barker,* 141 N. Y., 118, at page 122:

> "The foreign corporation is not to be taxed in all things the same as if it were a resident, because the statute expressly provides that it is only to be taxed for the sum invested in business in this state, and in order to tax it upon that sum no indebtedness should be allowed. The percentage, the form, the mode of the assessment and taxation upon the specific sum invested in business in this state are to be the same as if the person were a resident, but inasmuch as all the subjects of assessment against a non-resident are not within the jurisdiction of the state, but only the sum here invested, it is plain that it was never contemplated by the legislature that such non-resident should have the right to make deductions from that sum by reason of debts, while the taxing authorities would have no right to balance such deductions by an assessment of other property of the non-resident not situated within the state. The resident has no right to deduct his indebtedness from any specific piece of personal property, or from any special chose in action. In a general way it may be said that he is to be charged with all his personal property, and from that total he may deduct his debts. This cannot be done in

the case of a non-resident, although it may (as we may assume) be done at his domicile. All we are to do is to assess and tax the sum here invested, and the equities must, as we have said, be adjusted at the domicile of the person."

The rule laid down in the case last cited was amplified in *People ex rel. Hecker-Jones-Jewell Milling Company* v. *Barker,* 147 N. Y., 31 by permitting a non-resident to deduct from his taxable property within the state indebtedness incurred in the purchase of that property. The distinction between general deductions from a general tax and specific deductions from a special tax was thus explained by Peckham, J., at pages 41, 42:

"This treatment of the question is not in fact to be regarded in the light of a strict deduction of debts from assets; it is construing the meaning of the statute and determining what in reality is the sum invested by a non-resident individual or corporation under these circumstances, in the business in which he or it is engaged in this state. It is not adjusting the equities as spoken of in the *Thurber-Whyland* case, which we then held should be done at the place where the corporation was a resident. It is a different thing from ascertaining the general and gross assets of a non-resident to be found within the state, and from that sum deducting all its debts whenever and upon whatever cause incurred. The non-resident corporation investing a sum of money in this state is to be assessed for the full sum it invests here, although it may owe debts enough outside of such investment to render it insolvent. The indebtedness it has incurred in the transaction from which the purchase of the property is the result, is no part of the sum it has invested in such purchase and no assessment can be made which includes the amount of that indebtedness."

The distinction now complained of between residents and non-residents in the taxation of incomes is substantially the same distinction which the settled practice in the State of New York makes in the taxation of personal property. The statute taxing personal property has been on the statute books since 1855 at least and has thus been in force for a period of upwards of sixty years. No question appears ever to have been raised as to its validity. A holding that the same distinction made with reference to income tax is invalid would not only be contrary to the decisions of this Court cited above, but would apparently operate to invalidate the New York law taxing personal property.

Under the foregoing principles, it is submitted that the distinction made by the statute between residents and non-residents is a legitimate distinction which should be upheld as well within the state's power of classification.

This would be so even if, in fact, it operated to the disadvantage of non-residents. In fact, however, we contend that non-residents as a class are not discriminated against, but that whatever disadvantage may result to an individual non-resident in any particular case is due to his particular situation and not to any discrimination against non-residents as a class.

5. The statute does not in fact discriminate against non-residents as a class.

The statute contemplates that a resident shall be taxed on his entire net income after allowing the general deductions and the personal exemption.

He will then in the ordinary case still pay a larger tax than the non-resident who does not pay tax on his entire income, but only on income from sources within the state, excluding his income from the whole class of intangible property enumerated in Section 359, subdivision 3, even though within the state, who is allowed to deduct all losses of property within the state (Section 360, subdivision 5) and all deductions connected with income from sources within the state (Section 350, subdivision 11), and who in addition receives a credit of a proportionate share of any income tax payable at his domicile (Section 363).

The purpose and operation of the credit given by Section 363 are thus set forth in Professor Seligman's article above referred to at pages 47, 48:

> "We are led, therefore, to the remaining solution as the only possible one, namely, to subject residents to a general income tax on their entire income, from whatever source derived and to subject non-residents to the special income taxes; that is, to arrange that non-residents should be liable only on such income from special sources as is received or earned within the state.
>
> "This solution, satisfactory as far as it goes, is open to the criticism that if two states impose a similar tax and follow the same principle they may create cases of unjust double taxation by superimposing in practice special income taxes upon a general income tax. For if individual A earns his money and spends it in one state he would be taxed only once on his entire income; while B, with the same income, who earns his money in one state and has his legal residence in another, will be taxed twice, once by the state where the income is earned and again by his state of residence.

"A simple escape from this difficulty can, however, be found in a provision whereby the state where the income is earned permits the non-resident to make a proportionate deduction of such tax on the income earned within the state from the tax, if any, which may be levied by the state of residence. This was the solution suggested by the present writer and adopted in the New York law. The working out of the system in practice would then be as follows: If, in the first place, New Jersey, for instance, imposed no income tax, the Jerseyite would be subject to taxation in New York on his income earned within the state. To this special income tax there can surely be no objection. For if the tax be regarded as a general income tax New York is assuredly justified in seeking to reach the privilege side of the Jerseyite's taxable ability; if New Jersey elects not to attempt to reach the sacrifice side of his taxable ability, that is its own concern. But if the tax be regarded, as is more properly the case, as a special income tax on the non-resident, the defence of the solution is even stronger."

In *Travelers Insurance Co.* v. *Connecticut,* supra, this Court, in refusing to hold invalid a discrimination against non-residents in the Connecticut law taxing shares of stock in corporations, considered the system of taxation of Connecticut, and found that residents were in certain respects under a disadvantage as compared with non-residents, and held that the entire situation was for the consideration of the Connecticut legislature, with whose solution of the problem the Court could not interfere.

Under the system of taxation in New York the resident, as compared with the non-resident, labors under even greater disadvantages than those

found in the case cited to exist in Connecticut. To refer again to some of the respects in which the resident is at a disadvantage:

The resident is taxed on his entire income, whereas the non-resident is taxed only on his income from property and business within the state. (Section 351.)

The resident is taxed on the income from all his intangible property, whereas the non-resident is exempt, even with respect to his intangible property within the State. (Section 359, subdivision 3.)

The resident pays the full tax without deduction for taxes payable to other jurisdictions, whereas the non-resident has a credit for taxes paid at his domicile if his home jurisdiction allows a similar credit to residents of New York. (Section 363.)

The resident is subject to personal property tax on all his tangible personal property located within the state (Tax Law, Section 8), whereas the non-resident is taxable only on his tangible property located within the state (Tax Law, Section 7, subdivision 2) and such tax is a tax *in rem* and not in *personam* (*City of New York* v. *McLean*, 170 N. Y., 374; *Matter of Maltbie* v. *Lobsitz*, 223 N. Y., 227) and hence unenforceable by suit against non-residents.

The resident is subject to personal property tax on all his intangible property from which no income, subject to the income tax, is derived (tax law, Sections 8, 352), whereas the non-resident is exempted from all taxation on intangible property whether having a situs within the state or not (except as to capital invested in business in the state, Section 7, subdivision 1).

Taking the law as a whole, the balance of advantage is all in favor of the non-resident. Whatever

hardship there may be in the case of individual non-residents arises from the personal situation of the individuals concerned and not from any hostility to or discrimination against non-residents as a class.

On the other hand, to allow to non-residents taxable on a smaller basis the same exemptions and deductions as are allowed to residents taxable on their entire income would constitute a discrimination against residents.

6. Possible hardship in individual cases is not sufficient ground for invalidating the statute.

Cases may concededly be imagined where the refusal to allow a non-resident the same exemption and deductions as are allowed to residents may work a hardship. It is suggested, for example, that a resident of New Jersey may have no income other than a salary of $1,000 earned in New York, which, in the case of a resident of New York, would be exempt from taxation because not in excess of the personal exemption, but on which the resident of New Jersey will be required to pay a tax of $10. Aside from the fact that the hardship is a slight one, the tax on the smaller incomes being only at the rate of 1%, it is due to the situation of the particular individual. If the same individual had income from other sources outside of the State of New York or from securities within the State of New York, he would pay less than a resident in the same situation.

It is well established that differences and even hardships arising from the particular circumstances of an individual taxpayer do not invalidate a law,

for otherwise no law would be valid, since absolute equality in taxation is unattainable.

In *Henderson Bridge Co.* v. *Henderson City*, 173 U. S., 592, the Court said, at page 616:

> "In determining a question of this character, the power to tax existing, a judicial tribunal should not enter into a minute calculation as to benefits and burdens, for the purpose of balancing the one against the other, and ascertaining to what extent the burdens imposed are out of proportion to the benefits received. Exact equality and absolute justice in taxation are recognized by all as unattainable under any system of government."

As was said in *Travelers Insurance Co.* v. *Connecticut*, 185 U. S., 364, at page 369:

> "You cannot put one resident against one non-resident stockholder and by a comparison of their different burdens determine the validity of the legislation any more than you can place a stockholder resident in one municipality over against a stockholder resident in another municipality, and by comparison of their different burdens determine the validity of the tax law in respect to resident stockholders."

In *Maxwell* v. *Bugbee*, 251 U. S., *supra*, the rule was stated thus:

> "The question of equal protection must be decided as between resident and non-resident decedents as classes, rather than by the incidence of the tax upon the particular estates whose representatives are here complaining. Absolute equality is impracticable in taxation, and is not required by the equal protection clause. And inequalities that result not from hostile discrimination, but occasionally and

incidentally in the application of a system that is not arbitrary in its classification, are not sufficient to defeat the law."

7. In the last analysis the objection is really to the policy of the law, a question for the legislature and not for the courts.

We submit that plaintiff below has failed to sustain the burden resting upon it of showing affirmatively that the Act in fact discriminates arbitrarily against non-residents as a class (*Amoskeag Savings Bank* v. *Purdy*, 231 U. S., 373, 393.)

Underlying the whole argument in opposition to the law runs the idea that an income tax against non-residents, especially the present law, is unsound in theory and not good policy. The question of policy, however, as this Court has repeatedly held, is for the legislature to determine and not one for decision by the courts. This Court said, in *Travelers Insurance Co.* v. *Connecticut*, 185 U. S., 364, at page 371:

> "But further, the validity of this legislation does not depend on the question whether the courts may see some other form of assessment and taxation which apparently would result in greater equality of burden. The courts are not authorized to substitute their views for those of the legislature. We can only consider the legislation that has been had, and determine whether or no its necessary operation results in an unjust discrimination between the parties charged with its burdens. It is enough that the State has secured a reasonably fair distribution of burdens, and that no intentional discrimination has been made against non-residents."

And in *District of Columbia* v. *Brooke,* 214 U. S., 138, it was said at page 150:

> "The problems which are met in the government of human beings are different from those involved in the examination of the objects of the physical world, and assigning them to their proper associates. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws (*Billings* v. *Illinois,* 188 U. S., 97; *Health & M. Mfg. Co.* v. *Worst,* 207 U. S., 338)."

In *Flint* v. *Stone Tracy Co.,* 220 U. S., 107, it was said at page 169:

> "The argument, at last, comes to this: That because of possible results, a power lawfully exercised may work disastrously, therefore the courts must interfere to prevent its exercise, because of the consequences feared. No such authority has ever been invested in any court. The remedy for such wrongs, if such in fact exist, is in the ability of the people to choose their own representatives, and not in the exertion of unwarranted powers by courts of justice."

In *La Tourette* v. *McMaster,* 248 U. S., 465, it was said at page 468:

> "'But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise.' It is enough if the legislation be passed in the exercise of a power of government and has relation to that power. *Rast* v. *Van Deman & Lewis Co.,* 240 U. S., 342, 365, 366, and cases cited; also *Bunting* v. *Oregon,* 243 U. S., 426, 437."

A statute cannot be declared invalid on any such general grounds, but only if the party attacking it shows that it transgresses, to his injury, specific constitutional inhibitions set out in the record. (*Southern Railway Co.* v. *King,* 217 U. S., 524, 534; *Louisville & Nashville R. R. Co.* v. *Finn,* 235 U. S., 601, 610.

No question as to the operation of the statute in particular cases to which it may or may not be applicable is presented by the record; plaintiff's attack and the injunction appealed from are directed against the withholding by plaintiff of tax from *any* of plaintiff's non-resident employees without distinction as to the character of their employment or the nature or extent of their services, the income from which is taxable under the Act. It cannot be assumed that the Act will be enforced in such manner as to operate in violation of plaintiff's constitutional rights; any such possible violation can be passed on only when specially brought to the attention of the Court (*Hatch* v. *Reardon,* 204 U. S., p. 160, 161).

POINT II.

The statute does not exceed the power of the State over non-residents.

The objection, so far as the Fourteenth Amendment is concerned, reduces itself to this: that the State of New York has no power to tax non-residents with respect to their incomes from property and business within the State. The objection will be readily answered by reference to elementary and well settled principles.

1. The taxing power of a State extends over all persons, property and business within its jurisdiction.

In *Lane County* v. *Oregon,* 7 Wall., 71, at pages 76 and 77, the Court said:

> "Now, to the existence of the States, themselves necessary to the existence of the United States, the power of taxation is indispensable. It is an essential function. * * * The Constitution, it is true, greatly changed this condition of things. It gave the power to tax, both directly and indirectly, to the national government, and, subject to the one prohibition of any tax upon exports and to the conditions of uniformity in respect to indirect and of proportion in respect to direct taxes, the power was given without any express reservation. On the other hand, no power to tax exports, or imports except for a single purpose and to an insignificant extent or to lay any duty on tonnage, was permitted to the States. In respect, however, to property, business, and persons, within their respective limits, their power of taxation remained and remains entire. It is indeed a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislatures to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the national govern-

ment. There is nothing in the Constitution which contemplates or authorizes any direct abridgement of this power by national legislation. To the extent just indicated it is as complete in the States as the like power, within the limits of the Constitution, is complete in Congress."

This power is not subject to Federal control or supervision. As was said in *Michigan Central Railroad Co.* v. *Powers,* 201 U. S., 245, at page 293:

"We have had frequent occasion to consider questions of state taxation in the light of the Federal Constitution, and the scope and limits of national interference are well settled. There is no general supervision on the part of the nation over state taxation, and, in respect to the latter, the state has, speaking generally, the freedom of a sovereign, both as to objects and methods."

2. The power of a State to tax non-residents on their property and business within the State is so well settled as not to require extended argument.

New Orleans v. *Stempel,* 175 U. S., 309, and cases cited.

Armour Packing Co. v. *Lacy,* 200 U. S., 226.

Metropolitan Life Ins. Co. v. *New Orleans,* 205 U. S., 395.

Buck v. *Beach,* 206 U. S., 392, and cases cited.

Liverpool, etc., Ins. Co. v. *Board of Assessors of New Orleans,* 221 U. S., 346.

Armour & Co. v. *Virginia,* 246 U. S., 1.

American Mfg. Co. v. *St. Louis,* 250 U. S., 459, 463.

Appellee's argument that jurisdiction to tax non-residents extends only over specific property found within the jurisdiction runs counter to the well-settled rule that a state has power to tax all property and business within its jurisdiction and seeks to abridge the sovereign power of a state over all business and acts within its jurisdiction. No such limitation on the right to tax business within the state has ever been recognized. In *Pollock* v. *Farmers Loan and Trust Co.,* 158 U. S., pp. 635, 637, this Court clearly recognized a tax "on gains or profits from business, privileges or employments," as being in the nature of an "excise tax on business, privileges, employments and vocations." No authority exists, so far as we are aware, for any distinction with respect to jurisdiction between a business carried on by the aid of capital consisting of specific property within the state, and a vocation, employment or occupation carried on within the state by the rendition of personal services for the taxpayer's own account or on a salary for others. On the contrary, a tax on the sale of sewing machines by itinerant vendors was sustained in *Singer Sewing Machine Co.* v. *Burchell,* 233 U. S., 304, and a tax on transfers of shares of stock in *Hatch* v. *Reardon,* 204 U. S., 152, 159.

The argument that because the state cannot prohibit a non-resident from pursuing his vocation within the state it cannot tax him on his profits therefrom would destroy the power to impose occupation taxes altogether; as was said in *Hatch* v. *Reardon,* 204 U. S., 152, 162, "A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would be one."

3. Power to tax income from property or business follows from the power to tax property or business.

This proposition would seem self-evident. An income tax is not different in its nature from other taxes. It is a tax, the amount of which is measured by income instead of by capital values, or in some other way.

> "In a broad sense an income tax is a tax the amount of which is determined with reference to the income of the taxpayer." *Kennan, Income Taxation,* 9.

It would seem almost to require no argument that a State which has power to impose a personal tax can establish as a measure of the tax the taxpayer's income and that a State having power to tax property or business can measure the tax by the income from the property or the business. This proposition has uniformly been recognized as true and has never, so far as we are aware, been seriously questioned. Merely to state the argument that a State may tax property according to its capital value but not according to its income; that it may tax business according to its capital value or by arbitrary license fee but not in proportion to the income derived therefrom, is enough to show its fallacy.

The jurisdiction over non-residents asserted in the present statute is quite moderate in extent. The State of New York does not attempt to tax the income from the credits or securities of non-residents within the State, which it was held might be reached by a property tax in *New Orleans v. Stempel,* 175 U. S., 309, and cases there cited. It

does not undertake to measure the tax in proportion to the non-resident's entire income—a method which might have been warranted under the decision of this Court in *Maxwell v. Bugbee,* 251 U. S., ——, decided October 27, 1919. It undertakes to reach only the income of non-residents from property and from business within the State and uses as the measure of the tax only the income from such property and business, subject to deductions connected therewith and with a credit on account of taxes thereon imposed by the State of the taxpayer's domicile.

So moderate an exercise of jurisdiction is, we submit, not open to serious question.

A state having jurisdiction to impose a tax may adopt any method of arriving at the amount of the tax and unless the measure adopted is utterly arbitrary and unreasonable, it is not open to question in the courts.

In *Society for Savings* v. *Coite,* 6 Wall., 594, the Court upheld a tax on banks measured by the amount of their deposits on a given day, saying, at page 608:

> "Different modes of taxation are adopted in different States, and even in the same States at different periods of their history. Fixed sums are in some instances required to be annually paid into the treasury of the State, and in others a prescribed percentage is levied on the stock, assets, or property owned or held by the corporation, while in others the sum required to be paid is left indefinite, to be ascertained in some mode by the amount of business which the corporation shall transact within a defined period.
>
> Experience shows that the latter mode is better calculated to effect justice among the cor-

porations required to contribute to the public burdens than any other which has been devised, as its tendency is to graduate the required contribution to the value of the privileges granted, and to the extent of their exercise. Existence of the power is beyond doubt, and it rests in the discretion of the legislature whether they will levy a fixed sum, or if not, to determine in what manner the amount shall be ascertained."

In *Kirtland* v. *Hotchkiss*, 100 U. S. 491, the Court said at page 499:

"Whether the State of Connecticut shall measure the contribution which persons resident within its jurisdiction shall make by way of taxes, in return for the protection it affords them by the value of the credits, choses in action, bonds, or stocks which they may own (other than such as are exempted or protected from taxation under the Constitution and laws of the United States), is a matter which concerns only the people of that State, with which the Federal Government cannot rightly interfere."

In *Maine* v. *Grand Trunk Railway Co.*, 142 U. S., 217, the Court sustained a State excise tax on a railroad company measured by a percentage on its gross receipts. The Court said, at page 228:

"The character of the tax, or its validity, is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation, is open to the consideration of the State in determining what may be justly exacted for the privilege. The rule of apportioning the charge to the receipts of the business would seem to be

> eminently reasonable, and likely to produce the most satisfactory results, both to the State and the corporation taxed."

In *Metropolitan Life Insurance Co.* v. *New Orleans,* 205 U. S., 395, the Court sustained a tax on business done by a foreign insurance company within the State measured by the amount of its loans to resident policy holders. That decision was followed in *Liverpool etc., Ins. Co.* v. *Orleans Assessors,* 221 U. S., 346, 356, 357, sustaining a similar tax measured by the amount of premiums due to a foreign insurance company from resident policy holders.

This Court said in *Fidelity and Columbia Trust Co.* v. *Louisville,* 245 U. S., 54, 58:

> "Unless it is declared unlawful by authority we see nothing to hinder the State from taking a man's credits into account. But so far from being declared unlawful, it has been decided by this court that whether a State shall measure the contribution by the value of such credits and choses in action, not exempted by superior authority, is the State's affair, not to be interfered with by the United States, and therefore that a State may tax a man for a debt due from a resident of another State."

And the following is from the opinion of the Court in *American Manufacturing Co.* v. *St. Louis,* 250 U. S., 459, 463, sustaining a State excise tax on the manufacturing business done within the State by a non-resident corporation measured by the sales of goods so manufactured:

> "There is no doubt of the power of the State, of the City, acting under its authority, to impose a license tax in the nature of an excise upon the conduct of a manufacturing

business in the city. Unless some particular interference with Federal right be shown, the states are free to lay privilege and occupation taxes. *Clark* v. *Titusville,* 184 U. S., 329, 46 L. ed. 569, 22 Sup. Ct. Rep. 382; *St. Louis* v. *United R. Co.,* 210 U. S., 266, 276, 52 L. ed., 1054, 1058, 28 Sup. Ct. Rep., 630.

The city might have measured such tax by a percentage upon the value of all goods manufactured, whether they ever should come to be sold or not, and have required payment as soon as, or even before, the goods left the factory. In order to mitigate the burden, and also, perhaps, to bring merchants and manufacturers upon an equal footing in this regard, it has postponed ascertainment and payment of the tax until the manufacturer can bring the goods into market."

Income has long been regarded as a fair measure of a tax on property and business.

The following is from the opinion of Field, J., in *State Tax on Foreign-held Bonds,* 15 Wall, 300, at page 319:

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, *or its use, or its capacity, or its productiveness.* It may touch

business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction."

In *Scholey* v. *Rew,* 23 Wall., 331, this Court said, at page 348:

> "Exactions for the support of the government may assume the form of duties, imposts, or excises, or they may also assume the form of license fees for permission to carry on particular occupations or to enjoy special franchises, or they may be specific in form, as when levied upon corporations in reference to the amount of capital stock or to the business done or profits earned by the individual or corporation."

In *Michigan Central R. R. Co.* v. *Collector,* 100 U. S., 595, the following was said at page 599, regarding a Federal excise tax on railroad companies:

> "The tax is laid by Congress on the net earnings, which are the results of the business of the corporation, on which Congress had clearly a right to lay it."

In *Spreckles Sugar Refining Co.* v. *McClain,* 192 U. S., 397, the Court said, at page 411, discussing a Federal excise tax on corporations engaged in the business of refining petroleum or sugar:

> "Clearly the tax is not imposed upon gross annual receipts as property, but only in respect of the carrying on or doing the business of refining sugar. It cannot be otherwise regarded

because of the fact that the amount of the tax is measured by the amount of the gross annual receipts."

In *Flint* v. *Stone Tracy Co.,* 220 U. S., 106, this Court said, discussing the Federal Income tax, at pages 146, 165:

> "This tax, it is expressly stated, is to be equivalent to 1 per centum of the entire net income over and above $5,000 received from *all sources* during the year—this is the measure of the tax explicitly adopted by the statute. * * * In other words, the tax is imposed upon the doing of business of the character described, and the measure of the tax is to be the income, with the deduction stated, received not only from property used in business, but from every source. * * * It is contended that measurement of the tax by the net income of the corporation or company received by it from all sources is not only unequal, but so arbitrary and baseless as to fall outside of the authority of the taxing power. But is this so? Conceding the power of Congress to tax the business activities of private corporations, including, as in this case, the privilege of carrying on business in a corporate capacity, the tax must be measured by some standard, and none can be chosen which will operate with absolute justice and equality upon all corporations."

See also *United States Express Co.* v. *Minnesota,* 223 U. S., 335, 343, 345, reviewing this and other cases.

The Federal excise tax on corporations, under the Act of August 5, 1909, was described in *Doyle* v. *Mitchell Bros. Co.,* 247 U. S., 179, 183, as intended "not to tax property as such, or the mere conversion of property, but to tax the conduct of

the business of corporations organized for profit, by a measure based upon the gainful returns from their business operations and property from the time the Act took effect."

From the rule established by numerous decisions that a jurisdiction having no power to tax property cannot tax the income therefrom, the converse proposition would seem to follow, that power to tax income from property exists whenever there is jurisdiction to tax the property. The decisions on this subject are summarized in *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S., 429, at pages 581, 582, as follows:

> "In *Weston* v. *Charleston*, 2 Pet., 449, it was held that a tax on the income of United States securities was a tax on the securities themselves, and equally inadmissible. The ordinance of the City of Charleston involved in that case was exceedingly obscure; but the opinions of Mr. Justice Thompson and Mr. Justice Johnson, who dissented, make it clear that the levy was upon the interest of the bonds and not upon the bonds, and they held that it was an income tax, and as such sustainable; but the majority of the Court, Chief Justice Marshall delivering the opinion, overruled that contention.
>
> So in *Dobbins* v. *Commissioners*, 16 Pet., 435, it was decided that the income from an official position could not be taxed if the office itself was exempt.
>
> In *Almy* v. *California*, 24 How., 169, it was held that a duty on a bill of lading was the same thing as a duty on the article which it represented; in *Railroad Co.* v. *Jackson*, 7 *Wall.*, 262, that a tax upon the interest payable on bonds was a tax not upon the debtor, but upon the security; and in *Cook* v. *Pennsylvania*, 97 U. S., 566, that a tax upon the amount of sales

of goods made by an auctioneer was a tax upon the goods sold.

In *Philadelphia Steamship Co.* v. *Pennsylvania,* 122 U. S., 326, and *Leloup* v. *Mobile,* 127 U. S., 640, it was held that a tax on income received from interstate commerce was a tax upon the commerce itself, and therefore unauthorized."

In the *Pollock* case the Court held that the income tax was a direct tax upon the property from which the income was derived and also held that a tax upon the income of municipal bonds was invalid for the further reason that such bonds were beyond the taxing power of the Federal Government. In this last holding the Court was unanimous, White, J., saying in his dissenting opinion at page 652:

> " In regard to the right to include in an income tax the interest upon the bonds of municipal corporations, I think the decisions of this court, holding that the Federal government is without power to tax the agencies of the state government, embrace such bonds, and that this settled line of authority is conclusive upon my judgment here. It determines the question that where there is no power to tax for any purpose whatever, no direct or indirect tax can be imposed."

and the following is from the dissenting opinion of Harlan, J., at page 653:

> " While property, and the gains, profits, and income derived from property, belonging to private corporations and individuals, are subjects of taxation for the purpose of paying the debts and providing for the common defense and the general welfare of the United States, the instrumentalities employed by the States

> in execution of their powers are not subjects of taxation by the general government, any more than the instrumentalities of the United States are the subjects of taxation by the States."

Pertinent, also, is the citation from Alexander Hamilton, contained in the opinion of this Court on the rehearing in the same case, 158 U. S., 625, 626:

> "A tax upon one's whole income is a tax upon the annual receipts from his whole property, and as such falls within the same class as a tax upon that property, and is a direct tax, in the meaning of the Constitution. And Mr. Hamilton in his report on the public credit, in referring to contracts with citizens of a foreign country, said: 'This principle, which seems critically correct, would exempt as well the income as the capital of the property. It protects the use, as effectually as the thing. What, in fact, is property, but a fiction, without the beneficial use of it? In many cases indeed, the *income* or *annuity* is the property itself.' 3 Hamilton's Works, 34."

The rule laid down in these cases that the power to tax incomes depends upon power to tax the source of the income and that therefore in the absence of power to tax the source there is no power to tax the income therefrom, would seem to lead to the corollary that power to tax the source of the income carries with it power to tax the income therefrom.

This principle has been applied in decisions sustaining state income tax laws, all of which rest the jurisdiction of the state on its jurisdiction over

the person earning the income or the property or business from which the income proceeds.

> *State* ex rel. *Manitowoc Gas Co.* v. *Wisc. Tax Comm.*, 161 Wis., 111.
> *U. S. Glue Co.* v. *Oak Creek*, 161 Wis., 211; affirmed, 247 U. S., 321.
> *Bayfield Co.* v. *Pishon*, 162 Wis., 466.
> *Maguire v. Tax Commissioner*, 230 Mass., 503.
> *Commonwealth* v. *Werth*, 116 Va., 604.
> *Shaffer* v. *Howard*, 250 Fed., 873.

The present statute shows throughout careful recognition of the fact that power to tax income depends on power to tax the source of the income. In addition to the exemption of all income of non-residents not derived from property or business within the State, it exempts interest on the obligations of the United States and the compensation of officers and employees of the United States. (Sec. 359, 2, d. & f.)

4. The validity of the act depends not upon the theoretical nature of the tax but upon its practical operation and effect.

In many of these cases there is considerable discussion of the nature and characteristics of an income tax. The requirement of the Federal constitution for the apportionment of direct taxes, and the provisions of State constitutions requiring uniformity of taxation and establishing other limitations with reference to property taxes or

other specified kinds of taxes, have led to much argument as to the applicability of the particular provision in question to an income tax. These questions have occasioned much refinement of reasoning as to whether an income tax was a direct tax or an indirect tax; a personal tax or a tax in rem; a property tax, an excise tax or a privilege tax, and so on. These discussions, however relevant to the application of specific constitutional or statutory requirements governing a particular kind of tax, have no bearing on the question of jurisdiction.

The jurisdiction of a State to impose upon a non-resident a tax measured by his income from his property and business within the State depends on the fact that he owns the property or carries on the business within the State, irrespective of the theoretical classification of the tax. If the income tax be regarded as a property tax, it is imposed because the property is within the jurisdiction. If it is an occupation tax or an excise tax or a privilege tax, it is levied because the business is carried on within the jurisdiction. If it be regarded as a personal tax, the non-resident, to the extent to which he comes within the State and owns property and carries on business there, submits himself to its jurisdiction.

Appellee's argument throughout assumes that in order to sustain a tax its specific theoretical character must be ascertained and determined to come within the class of taxes which states have been accustomed to lay, in effect preventing a State from devising new kinds of taxes; whereas the established principle is that with respect to persons, property or business within its jurisdiction a State has sovereign power to lay such

taxes as it sees fit, whether new or old in kind, subject to being set aside only if they violate some constitutional limitation.

The argument that the tax depends on the supposed situs of an income as an independent thing overlooks the fact that the income is used as a mere measure of the tax.

The argument that the tax against non-residents is invalid because it is a tax on the person of the non-resident rather than a tax against him with respect to his property or business within the State, is unsound, we submit, for two reasons: first, it assumes that because the tax on the entire income of a resident is a tax on the resident personally, therefore the tax on the non-resident's income from property or business within the State is likewise a tax on the non-resident personally, thus ignoring the distinction between a general income tax and a special income tax discussed under Point I, *supra;* second, it assumes that because a state has no general jurisdiction over the person of a non-resident it cannot assume jurisdiction over him to the extent to which he comes into the State and does business there.

As was said in *Tappan v. Merchants National* Bank, 19 Wall., 490, 499, 503:

> "The power of taxation by any State is limited to persons, property, or business within its jurisdiction. Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its *situs* at his domicile. But, for the purposes of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located. These are familiar principles, and have been often acted upon in this

court and in the courts of Illinois. If the State has actual jurisdiction of the person of the owner, it operates directly upon him. If he is absent, and it has jurisdiction of his property, it operates upon him through his property. * * * It must be borne in mind that all this property, intangible though it may be, is within the State. That which belongs to non-residents is there by operation of law. That which belongs to residents is there by reason of their residence. All the owners have submitted themselves to the jurisdiction of the State and they must obey its will when kept within the limits of constitutional power."

See also *Corry* v. *Baltimore*, 196 U. S., 475.

The jurisdiction of a State depends not on metaphysical niceties, but on the actual facts of power and control. When a resident of New Jersey is arrested for violating traffic regulations in driving his automobile in the streets of the City of New York, the power to punish him does not depend on the answer to the question whether the traffic regulation was directed in rem against his automobile, or personally against him, or merely operated on his act in driving the automobile. The jurisdiction rests on the fact that he was driving an automobile in the streets of New York and was subject to its laws. And so, when a resident of New Jersey or Connecticut owns property or transacts business in New York, New York has power to tax him on the income derived therefrom, and no question of abstract theory should allow him to escape his share of the burdens borne by other property and business within the State. State courts may determine for themselves the precise nature of the tax as determined by local constitutional or statutory provisions. This Court concerns itself

only with the fact of jurisdiction arising from control over the source of the income taxed. It has repeatedly held that jurisdiction depends not on the name or theoretical nature of the tax, but on its practical effect. In *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S., 688, 696, 697, the Court said:

> "Doubtless, no state could add to the taxation of property according to the rule of ordinary property taxation, the burden of a license or other tax on the privilege of using, constructing or operating an instrumentality of interstate or international commerce or for the carrying on of such commerce, but the value of property results from the use to which it is put and varies with the profitableness of that use, and by whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution. *Cleveland, C. C. & St. L. R. Co.* v. *Backus,* 154 U. S., 439, 445."

In *Adams Express Co.* v. *Ohio State Auditor,* 166 U. S., 185, 225, the Court said:

> "In conclusion, let us say that this is eminently a practical age; that courts must recognize things as they are and as possessing a value which is accorded to them in the markets of the world, and that no fine-spun theories about *situs* should interfere to enable these large corporations, whose business is carried on through many states, to escape from bearing in each state such burden of taxation as a fair distribution of the actual value of their property among those states requires."

In *Knowlton* v. *Moore,* 178 U. S., 41, 82, 83, in quoting from *Nicol* v. *Ames,* 173 U. S., 509, the Court said:

"'The commands of the Constitution in this, as in all other respects, must be obeyed; direct taxes must be apportioned, while indirect taxes must be uniform throughout the United States. But while yielding implicit obedience to these constitutional requirements, it is no part of the duty of this court to lessen, impede, or obstruct the exercise of the taxing power by merely abstruse and subtle distinctions as to the particular nature of a specified tax, where such distinction rests more upon the differing theories of political economists than upon the practical nature of the tax itself.

"'In deciding upon the validity of a tax with reference to these requirements, no microscopic examination as to the purely economical or theoretical nature of the tax should be indulged in for the purpose of placing it in a category which would invalidate the tax. As a mere abstract, scientific or economical problem, a particular tax might possibly be regarded as a direct tax, when as a practical matter pertaining to the actual operation of the tax it might quite plainly appear to be indirect. Under such circumstances, and while varying and disputable theories might be indulged in as to the real nature of the tax, a court would not be justified, for the purpose of invalidating the tax, in placing it in a class different from that to which its practical results would consign it. Taxation is eminently practical, and is, in fact, brought to every man's door, and for the purpose of deciding upon its validity, a tax should be regarded in its actual practical results, rather than with reference to those theoretical or abstract ideas whose correctness is the subject of dispute and contradiction among those who are experts in the science of political economy.'"

In *Fidelity & Columbia Trust Co.* v. *Louisville*, 245 U. S., 54, the Court said, at page 59:

> "It is unnecessary to consider whether the distinction between a tax measured by certain property and a tax on that property could be invoked in a case like this. *Flint* v. *Stone Tracy Co.,* 220 U. S., 107, 146, 162, *et seq.* Whichever this tax technically may be, the authorities show that it must be sustained."

And in *American Manufacturing Co.* v. *St. Louis,* 250 U. S., 459, 462, 463, the Court said:

> "But, as has been held very often, the question whether a state law or a tax imposed thereunder deprives a party of rights secured by the Federal Constitution depends not upon the form of the act, nor upon how it is construed or characterized by the state court, but upon its practical operation and effect. *St. Louis Southwestern R. Co.* v. *Arkansas,* 235 U. S., 350, 362; *Mountain Timber Co.* v. *Washington,* 243 U. S., 219, 237; *Crew Levick Co.* v. *Pennsylvania,* 245 U. S., 292, 294."

Nor does the possibility of double taxation invalidate a law.

As this Court said in *Kidd* v. *Alabama,* 188 U. S., 730, 732:

> "No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far."

The decision last cited was followed in *Hawley* v. *Malden,* 232 U. S., 1.

5. The practical effect of denying or unduly limiting the power of a State to tax non-residents would be a serious impairment of that power of taxation which is essential to sovereignty.

Such a holding would be especially disastrous to a state like New York, having a large number of non-residents within its borders owning property and doing business under the protection of the State, who should not be allowed to escape their fair share of the burdens of taxation, leaving the entire burden to fall upon the residents of the State.

This situation is depicted in Professor Seligman's article above referred to as follows, at p. 41:

> "In many of the less advanced states of the union, the great majority of incomes within the state are earned by residents of the state; that is to say, there are comparatively few non-residents who sojourn for a protracted period within the state. And, on the other hand, most of the residents of the state secure all or a very large part of their revenue from property situated or business conducted without the state. In New York, however, the situation is very different. In the first place, New York City, as the great metropolitan center, attracts people from all over the country. Not only do they swarm to New York for weeks or months at a time, but a large number of wealthy individuals, who still retain their legal residence in other states, erect princely mansions in New York and live there most of the year. On the other hand, New York City is the financial center of the country; we know that more than one-third of the individual income tax of the entire country is paid in New York. That means that the wealthy residents of New York

> own a large part of the property of the nation and that the incomes received in New York are to a considerable extent received from sources outside of the state. Finally, New York, as the industrial center of the country, is crowded with hundreds of thousands of members of the professional classes and of wage-earners who get their living in the city but who commute to the suburbs. Northern New Jersey and, to a less extent, southwestern Connecticut, are nothing but suburbs of New York.
>
> Thus from both points of view the question of double taxation, *i. e.*, the taxation of non-residents on income received within the state and of residents on incomes received without the state, assumes in New York a significance which in practice far transcends that in any other part of the country."

The evil which would result from allowing non-residents to escape the tax is thus stated in the same article at page 47:

> "This solution of the problem would involve the important practical consequence that any New Yorker who desired to escape his taxes could easily do so by transferring his legal residence to his summer home in New Jersey. It is well known that the chief reason why the general property tax has broken down so completely in New York City is the facility afforded to wealthy New Yorkers to claim their legal residence in the environs. The one great advantage of the income tax over the property tax is that it tends to decrease this movement. Such a result, however, would be entirely defeated if non-residents were exempted on their income earned within the State of New York. No solution of the problem which fails to put a stop to this deplorable practice of local expatriation can be acceptable. The exemption

of non-residents from income taxation would fail to cure the existing inequality of the general property tax and would create a new and still more indefensible inequality."

And the unfairness to residents of the State which would take place is thus set forth at page 40:

> "Not only is the method defensible, but for New York to refrain from action would involve an inequality. If two contiguous pieces of land are owned respectively by a New Yorker or a Jerseyite, if two competing business houses are occupied respectively by a New Yorker or a Jerseyite, if two dentists, one a New Yorker and the other a Jerseyite, carry on their professions on opposite sides of the same New York street, is there any reason why, in the absence of any income tax by the State of New Jersey, the Jerseyite should be preferred to the New Yorker? Why should the sources of income within the state be taxable to some and not to others? Far from imposing any additional burden upon the Jerseyite or interfering in any way with interstate commerce, the taxation of the Jerseyite would bring about substantial equality in treatment with that of the New Yorker. To do less than this would give him an unjustifiable preference."

Appellee's contention that non-residents are not subject to the tax, but that the power of the State to lay an income tax depends on the legal domicile of the taxpayer, amounts to a negation of the sovereign power of taxation. For it is elementary that in this country a person has the right to select his domicile and to change it at will. Domicile depends largely on the intention of the individual (*Gilbert* v. *David* 235 U. S., 561, 569, 571). If the power of a State to tax property and busi-

ness within its jurisdiction by the equitable measure of an income tax is made to depend on the voluntary act of each individual taxpayer in deciding upon his legal domicile then the states are indeed reduced to impotence. Taxing power dependent not upon the sovereign will of the state but on the individual will of the persons subject to the tax is a contradiction in terms. A power to tax residents or non-residents according to the state of mind of the individual subject to it is inconceivable.

A similar contention to that of the appellee here was made and overruled in *Adams Express Co.* v. *Ohio State Auditor,* 166 U. S., 185. It was there argued that a corporation domiciled in one state could not be taxed on its business in another, but only on its tangible property there situated. This Court said at page 224:

> "It may be true that the principal office of the corporation is in New York, and that for certain purposes the maxim of the common law was 'Mobilia personam sequuntur,' but that maxim was never of universal application, and seldom interfered with the right of taxation. *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S., 18, 22. It would certainly seem a misapplication of the doctrine expressed in that maxim to hold that by merely transferring its principal office across the river to Jersey City the situs of $12,000,000 of intangible property, for purposes of taxation, was changed from the state of New York to that of New Jersey."

It would be equally absurd and equally dangerous to hold that a person doing business in New York could avoid being taxed on the income from his property and business in New York by merely moving his domicile across the river to Jersey City.

POINT III.

The withholding provisions of the statute are not unconstitutional.

The power of a state to require information and withholding at the source is sufficiently shown by the authorities cited at pages 55 to 58 of appellant's brief.

The case of *New York, Lake Erie & Western Railroad Co.* v. *Pennsylvania,* 153 U. S., 628, 645, 646, relied on by appellee, has no bearing here; in that case the statute was held void expressly because the State of Pennsylvania required a New York Corporation to withhold "*in the state of its creation.*" The opinion of the Court clearly indicates that the power would have been unquestioned if it had operated within the jurisdiction of the State of Pennsylvania. The power of a state to require such withholding by national banks located within the state has been repeatedly upheld. (*First National Bank* v. *Kentucky,* 9 Wall, 353; *Merchants & Manufacturers National Bank* v. *Pennsylvania,* 167 U. S., 461; *Aberdeen Bank* v. *Chehalis County,* 166 U. S., 440, 444 to 446; *Clement National Bank* v. *Vermont,* 231 U. S., 120, 140.)

And in *Hinson* v. *Lott,* 8 Wall., 148, it was held that although the method of collecting a tax was different with respect to property coming from without the state, this was an appropriate and legitimate exercise of the taxing power of the state.

The provision for withholding is an essential method for enforcement of the tax against non-residents and was sustained as such by the Court below.

The power to lay the tax would be of little value

if the state had not the right to enforce it by requiring all persons within its jurisdiction to withhold the tax from salaries paid by them to non-residents. The requirement of withholding is limited to salaries earned within the state by non-residents, which it would be impossible to reach otherwise.

So far as the plaintiff is concerned, the withholding provision is a mere exercise by the state of its power of regulation and control over corporations doing business within its borders, a power that is as extensive over foreign corporations authorized to do business in the state as over domestic corporations (*Orient Insurance Co.* v. *Daggs,* 172 U. S., 557, 566).

Appellee comes within this class. It is alleged in the complaint:

> "Your orator is authorized to transact its business in the State of New York and maintain an office for the transaction of its business in the City of New York, in said State, where it owns and possesses real and personal property. In the conduct of its business your orator employs a large number of persons, many of whom are non-residents of the State of New York as defined in the statute hereto annexed, who are occupied in whole or in part *in the business of your orator within the State of New York.*"

It is not alleged and is not to be assumed that plaintiff will be called upon to withhold or pay any tax otherwise than in the State of New York and in connection with its business actually transacted within the State of New York.

The argument based on the apparent discrepancy between the provision imposing a tax at a grad-

uated scale of one, two and three per cent. (Sec. 351) and the provision requiring the withholding of the tax at the rate of two per cent. (Sec. 366) is, we submit, disposed of by the opinion of the Attorney General of the State printed at pages 62 to 64 of appellant's brief, wherein it is shown that notwithstanding the lack of care with which the statute was hastily amended, the Act, read as a whole, requires withholding only at the rate of tax actually payable. This question of the construction of the statute is a domestic question presenting no federal question; and as the construction placed upon it by the state officials is favorable to the taxpayer, plaintiff has no ground for complaint.

It is respectfully submitted that the judgment of the Court below should be reversed and the case remanded with directions to dismiss the complaint.

LAURENCE ARNOLD TANZER,
WILLIAM P. BURR,
WILLIAM S. RANN,
WILLIAM J. WALLIN,
As *amici curiae* on behalf of Conference of Mayors and other City Officials of the State of New York.

No. 548

Supreme Court of the United States

OCTOBER TERM, A. D. 1919.

EUGENE M. TRAVIS, as Comptroller of the State of New York,

Appellant,

vs.

YALE & TOWNE MANUFACTURING CO.,

Respondent.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY.

JOHN W. GRIGGS,
Counsel for the State of New Jersey
as *amicus curiae.*

SUBJECT INDEX.

ALPHABETICAL LIST OF CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1919.

No. 548.

EUGENE M. TRAVIS, as Comptroller of the State of New York, Appellant, vs. THE YALE & TOWNE MANUFACTURING COMPANY, Respondent.	On Appeal from the District Court of the United States for the Southern District of New York.

BRIEF OF JOHN W. GRIGGS FOR THE STATE OF NEW JERSEY.

This brief, with the consent of counsel of the respective parties, and by permission of the Court, is filed by me as *amicus curiae* on behalf of the State of New Jersey.

Every working day of the year a great many citizens of New Jersey, numbered by hundreds of thousands, go into the City of New York for the purpose of there transacting business of every kind and carrying on their respective trades and occupations. In this number are embraced officers, clerks and employees of national banks located in the City of New York; officers, clerks and other employees of insurance corporations and manufacturing corporations; bankers, brokers, stenographers, mechanics, telephone operators, telegraph operators, and day laborers.

The State of New York by the statute known as the Income Tax Law of the State of New York, approved May 14, 1919, and printed in the Transcript of Record, seeks to impose upon each and every one of these persons a tax "upon and with respect to the entire net income," as in said act defined. The statute in question will, if enforceable and enforced, affect according to estimates half a million persons, citizens of New Jersey, who carry on business in the State of New York, and the grave concern of the Government of New Jersey in the issue of this case is apparent. The authorities of the State of New Jersey, acting through the Governor of that State, have directed me, on its behalf, to present to the Court their protest against the validity of the statute in question and the reasons why the said statute is unconstitutional and void so far as it affects citizens and residents of the State of New Jersey.

The language of the act imposing the tax is contained in Section 351:

> "A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined, at rates as follows: one per centum of the amount of net income not exceeding ten thousand dollars; two per centum of the amount of net income in excess of ten thousand dollars but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars. *A like tax* is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state."

The Income Tax Law of the State of New York is unconstitutional and in violation of Article IV, Section 2 of the Constitution of the United States, which provides that,

> **"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."**

And because it violates Section 1 of the Fourteenth Amendment of the Federal Constitution, which provides that,

> **"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."**

No complete definition of the phrase "privileges and immunities" has ever been judicially made, but the declaration of this Court in *Ward* v. *Maryland,* 12 *Wall.,* 418, has been frequently cited as the nearest approach to a full definition of these words and for the purposes of this argument is deemed entirely adequate and sufficient.

The right of citizens of Connecticut and New Jersey to pass into the State of New York and there to engage in lawful trade, business, or manual occupation equally with the citizens of the State of New York is undoubted.

This right is not derived from the Constitution or laws of New York, but from the provisions of the Federal Constitution. The State has no power to grant this right nor to withhold it. The only question in any case is, what privileges and immunities are possessed by the citizens of New York. When that is determined, it follows as a

matter of constitutional right that the same privileges and immunities belong to the citizens of each of the other States of the Union.

Slaughter House Cases, 83 *U. S.*, 36.

Hence it follows that the State of New York has no power to impose a license, privilege or excise tax upon non-residents carrying on any trade, business or occupation within that State, unless a similar license, privilege or excise tax is imposed upon citizens of New York.

The non-resident persons whose income is sought to be taxed, as appears from the bill of complaint in this case, are employees such as are ordinarily engaged in the transaction of the business carried on by the respondent, Yale & Towne Manufacturing Company, and comprise salesmen, clerks, accountants, day laborers, etc. It is not claimed that any license is required from the State of New York to enable them legitimately to carry on their occupations in that State, and no such license is required as to citizens of that State engaged in the same kind of occupations.

New York does not by its statute pretend to confer any privilege, nor does it in any way attempt to make the exercise of an occupation in that State conditional upon payment of the income tax.

The imposition of an income tax, therefore, cannot be sustained legitimately upon any ground of privilege derived from or granted by New York.

If the imposition of the tax cannot be sustained as a privilege tax, upon what basis can it be sustained?

In *M'Culloch* v. *Maryland*, 4 *Wheat.*, 316, it was declared by Chief Justice Marshall, that "all subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend, are, upon the soundest principles, exempt from taxation."

And further in the same case it was said:

> "The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission."

In the argument of Mr. Attorney General Olney, in *Pollock* v. *Farmers Loan & Trust Co.,* 157 *U. S.,* 429, the essential qualities and character of the tax are properly stated, thus:

> "A tax for the benefit of the public should fall equally upon all persons composing the public, should, as text-writers and judges often express it, be ratable and proportional, and be so adjusted that every member of the community shall contribute his just and equal share toward the common defense and the general welfare."

Taxes are levied upon the residents, inhabitants or citizens of a state or upon property located in the state, for the purpose of defraying the expenses of government. The obligation to support and maintain the government of the state rests upon its citizens and inhabitants. It does not rest upon strangers or casual visitors. Property within a state is taxed because it enjoys the protection afforded by the laws and administration of the state. Citizens of a state are taxed because they enjoy the privileges accorded to them under the constitution and laws of the state and also receive the protection of the state. Citizens of a state are not only charged with the duty of maintaining its government by the payment of taxes, but also by the performance of certain public duties, such as serving on juries, or in the militia, or in public offices. This is because they are "subject to the jurisdiction" of the state.

The status, therefore, of citizens of a state is quite different from that of non-residents, in this and in many other respects. A non-resident, whether engaged in a business or occupation or in passing through a state or temporarily stopping there, is of right entitled to pro-

tection in his person and property, not as a citizen of the state, but as a citizen of another state, under the provisions of the Federal Constitution.

It is obvious, then, that to require a non-resident to pay a contribution toward the expenses of the state in which he happens to earn money, is to require him to pay something which in public policy and according to right and justice he does not owe.

One limitation upon the power of taxation of any state is that such power can be legally exercised only upon the assumption of an equivalent rendered to the taxpayer in the protection of his person or his property.

This limitation is expressed by this Court in *Union Refrigerator Transit Co.* v. *Kentucky,* 199 *U. S.,* 194, as follows:

> "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law. *Railroad Co.* v. *Jackson,* 7 *Wall.* 262, 19 *L. Ed.* 88; *State Tax on Foreign Held Bonds,* 15 *Wall.* 300, 21 *L. ed.* 179; *Tappan* v. *Merchants' Nat. Bank,* 19 *Wall.* 490-499, 22 *L. ed.* 189-193; *Delaware, L. & W. R. Co.* v. *Pennsylvania,* 198 *U. S.* 341, 358, 49 *L. ed.* 1077, 1083, 25 *Supr. Ct. Rep.* 669."

The hundreds of thousands of persons who go into the City of New York every working day from Connecticut and New Jersey to engage in useful occupations are not conscious that they do so by the grant of any special privilege from the State of New York, nor are they conscious that they owe to the State of New York any return in money for the privilege of engaging in their occupations in that State. If the subject is looked at from the viewpoint of public interest, it would seem that the contributions and services from this multitude of people to the general business and productiveness to the State of New York would largely outweigh any expenses of police protection afforded them by the municipality of the City of New York.

"The general rule undoubtedly is," says Judge Cooley, in *Cooley's Constitutional Limitations,* page 889,

> "That any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them."

It cannot be doubted that the tax imposed by the statute of New York is a personal tax. It is not on property; it is not an excise or privilege tax, as no privilege is granted. It is a tax on the person carrying on a lawful occupation in New York, and is measured by the amount of his earnings in that State. The income is merely the standard by which the amount of the personal tax is measured. Reduced to "the last analysis," it is an attempt to compel citizens of other States engaged in lawful occupations in New York, which that State can neither license nor prohibit, to contribute to the expenses of administering the government of New York, a State which has no jurisdiction over them, to which they owe no allegiance

nor any support, and from which they receive no benefit or protection except such as the State is bound to give to every one within its borders, whether residents, sojourners or strangers.

The very language of the act indicates that the tax is imposed, not upon property, not upon occupation, not as a privilege, but directly upon the individual; for the law declares, "a tax is hereby imposed *upon every resident* of the State."

The tax in question is not a property tax and has no relation to property as such. Its nature is clearly defined in the case of *Manitowoc Gas Co.* v. *Wisconsin Tax Commission,* 152 *N. W.,* 848, wherein, considering an income tax provision of the State of Wisconsin essentially similar to that of the State of New York, the Court said:

> "Our income tax is a burden laid upon *the recipient of the income,* whether derived from real estate, personal property or labor, the amount of which is determined by the amount of the total net income derived from those sources, singly or combined."

The same Court in the case of *State* v. *Wisconsin Tax Commission,* 163 *N. W.,* 639, repeated this statement and said:

> *"It is the recipient of the income that is taxed,* not his property. * * * The tax is upon the right or ability to produce, create, receive and enjoy and not upon the specific property."

Further in the same case the Court declared:

> "But the tax does not seek to reach property or an interest in property as such. It is a burden laid upon *the recipient of an income.*"

It makes no difference under this law of New York whether the income is paid to the non-resident within that State or elsewhere. He is taxed by reason of the fact that he *earns* an income in New York and not by

reason of the fact that he *receives* his income there. There is absolutely nothing on which to base the imposition of the tax except the fact that the non-resident labors, carries on a business or occupation, or receives an income from property in New York. It is clear, therefore, that the tax is laid upon the right of laboring, doing business, or carrying on an occupation in that State. That a tax cannot be imposed upon this basis upon a non-resident seems, therefore, to be beyond question.

That the United States Government taxes the incomes of non-resident aliens from property or business within the United States is no justification for taxation by New York of income earned by a non-resident within the State.

The rights of citizens of one state to labor and do business in another state is quite different from the rights of aliens to do business in the United States. There is no constitutional restriction on the Federal Government in favor of aliens. There are constitutional restrictions upon the states in favor of citizens of other states.

It has never been authoritatively decided that the United States has power to tax the incomes of aliens not resident in this country.

In *Railroad Co.* v. *Collector,* 100 *U. S.,* 595, it was held that whether Congress, having power to enforce the law, has the authority to levy a tax on the interest due by a citizen of the United States to one who is not domiciled within our limits, and who owes the Government no allegiance, is a question not necessary to the decision of the case.

It was urged in that case that the tax on the interest paid by corporations on their bonds held in London was a tax on the property of persons not subject to jurisdiction of the Government and, therefore, beyond the power of Congress to levy or enforce; but this Court held that such a tax was an *excise tax* on the business of railroad corporations laid upon their earnings.

In *United States* v. *Erie Railroad Co.,* 16 *Otto,* 327, a tax upon the income from bonds of the Railroad Company held by aliens, made payable by the Railroad Company, was held to be an excise tax. In the opinion of Mr. Justice Bradley in that case it is said:

> "The objection that Congress had no power to tax non-resident aliens is met by the fact that *the tax was not assessed against them personally,* but against the *rem,* the credit, the debt due to them."

Against even this, was the dissenting opinion of Mr. Justice Field , who, among other things, said:

> "There are limitations upon the powers of all governments without any express designation of them in their organic law; limitations which inhere in their very nature and structure, and this is one of them—that no rightful authority can be exercised by them over alien subjects, or citizens resident abroad or over their property there situated."

In that same opinion Mr. Justice Field quotes the language of Chief Justice Green of the Supreme Court of New Jersey in *State* v. *Ross,* 23 *N. J. L.,* 521:

> "A *personal tax* is the burden imposed by Government upon its own citizens for the benefits which that Government affords by its protection and its laws, and any Government which should attempt to impose such a tax upon the citizens of other states would justly incur the rebuke of the enlightened sentiment of the civilized world."

The distinction between the power of states and the power of the United States in matters of taxation is set forth in the opinion of Chief Justice White in *United States* v. *Bennett,* 232 *U. S.,* 299.

The principle of the cases affecting taxation by the states is approved, as expressed in the following statement:

"It is a settled rule of constitutional law that the power to tax depends upon *jurisdiction of the subject matter of the tax.* A long line of unbroken authority illustrates this firmly established doctrine in its various aspects and although the cases have all arisen under state tax laws, their reasoning is applicable to and controlling in the case of a Federal tax act."

Referring to the greater power of taxation possessed by the United States, it is said:

"It is co-extensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution and therefore embraces all the attributes which appertain to sovereignty in the fullest sense."

And again:

"Because the limitations of the Constitution are barriers bordering the States and preventing them from transcending the limits of their authority and thus destroying the rights of other States and at the same time saving their rights from destruction by the other States, in other words of maintaining and preserving the rights of all the States, affords no ground for constructing an imaginary constitutional barrier around the exterior confines of the United States for the purpose of shutting that government off from the exertion of powers which inherently belong to it by virtue of its sovereignty."

The very strong and able opinion of Judge Campbell (dissenting) in *Shaffer* v. *Howard*, 250 *Fed.*, 873-883, is especially called to the attention of the Court as containing a correct statement of the principles involved and a just and accurate discrimination of the difference between Federal taxation and State taxation.

The case of *Shaffer* v. *Howard* was appealed to this Court and pending argument it appeared that the term of office of the defendant officials had expired and that without authority of continuance of the cause of action,

the controversy had become moot, so that the main questions involved were not considered by this Court, and the cause was remanded with directions to dismiss the bill for want of proper parties. See memorandum opinion of Mr. Chief Justice White filed March 10, 1919.

For convenience, parts of Judge Campbell's interesting and persuasive opinion are printed in the appendix to this brief.

Counsel for appellant in their brief base their argument for the validity of the tax upon propositions which seem to disregard the recognized restrictions upon the taxing power of any state, to which we hereinbefore have referred.

On page 10 of their brief counsel for appellant say:

> "It really does not matter whether this tax be regarded (so far as non-residents are concerned) as direct or indirect, a tax on the person, on property, or on privilege. States can and do levy all three kinds. The only question is whether the State has *power* to enforce this tax, and its nature does not assist in determining that question. Whether or not sovereign power to enforce a tax exists, depends solely on the ability of the State to collect it without extending its jurisdiction beyond its territorial boundaries. * * * It can extend personal taxes to those over whom it has personal jurisdiction, compelling them to submit or move out. *This inherent power in the sovereign extends equally to residents and to non-residents, to citizens and to aliens.* And the underlying reason for taxation, the support of the government in its protection of the lives, liberty and property of those having life, liberty or property within its borders, extends equally to residents and non-residents, citizens and aliens."

In the first two sentences of this quotation counsel consider a tax imposed on the person as distinguished from a tax on property and privilege, and then they argue that it does not matter whether this tax be regarded, so far as non-residents are concerned, as a tax on the person, on property or privilege, and that the sole question is whether the state *has power* to enforce this tax, and that its nature does not assist in determining that question; within the language of this argument, New York would have power to impose any tax imposed entirely upon the person of a citizen of New Jersey, if New York happened to have the power to enforce it by a levy upon property which the non-resident might have in New York.

In the case stated apparently no equivalent need be given by the state for the tax, and no thought need be given to the question whether or not it be discriminatory between residents and non-residents, if the sole criterion of the state's power to tax is its power to enforce it.

After the assertion of this proposition in appellant's brief, it is difficult for us to reconcile it with and to comprehend the assertion in their brief at page 11, as follows:

> "And the underlying reason for taxation: the support of the government in its protection of the lives, liberty and property of those having life, liberty or property within its borders, extends equally to residents and non-residents, citizens and aliens."

Sections 360 and 362 of the law, by allowing exemptions and deductions to residents which are not allowed to non-residents, violate Section 2 of Article IV and the Fourteenth Amendment of the Federal Constitution.

Upon that subject we deem it unnecessary to add to the thorough discussion of the subject by Judge Knox in his opinion in the Court below.

It is fitting that something should be said with refe
ence to the general policy of such a state income tax a
this.

The scheme of the Federal Constitution was to unit
the people of the various states in one Federal citizenshi
and to put an end to those local discriminations and im
positions by one state upon the citizens of another stat
which had so seriously impaired the efficiency of the Gov
ernment under the Confederation.

As stated by this Court in *Paul* v. *Virginia*, 8 *Wall*
168, 180:

> "It was undoubtedly the object of the clause i
> question to place the citizens of each state upo
> the same footing with citizens of other States, s
> far as the advantages resulting from citizenship i
> those states are concerned. It relieves them from
> the disabilities of alienage in other states; it in
> hibits discriminating legislation against them b
> other states; it gives them the right of free ingres
> into other states, and egress from them; it insures t
> them in other states the same freedom possessed b
> the citizens of those States in the acquisition an
> enjoyment of property and in the pursuit of happ
> ness; and it secures to them in other states th
> equal protection of their laws. It has been justl
> said that no provision in the Constitution ha
> tended so strongly to constitute the citizens of th
> United States one people as this."

The evils and inconveniences experienced under th
Constitution by reason of the efforts of one state to lev
taxes and imposts upon commerce between the states wa
removed by the interstate commerce clause of the Con
stitution.

To what extent the State of New York had gone in tha
particular direction and the unfortunate retaliation calle
forth by the States of New Jersey and Connecticut is in
terestingly described by Professor McMaster in his wor

"History of the People of the United States," Vol. 1, page 404.

I have printed in the appendix Professor McMaster's statement of this incident.

Similar unfortunate attempts by one state to levy their public contributions on citizens of other states are likely to be resorted to. It is most important that the scheme and policy of the Constitution be so interpreted as to prevent such efforts. It is easily conceivable that special income taxes might be laid by the State of New York upon persons doing business in New York City, not for state purposes, but for municipal purposes, in addition to income taxes for state purposes, thus imposing upon the citizens of Connecticut and New Jersey, and upon the citizens of all other states who do business in New York City, the burden of contributing to the enormous municipal expenses of that metropolis.

It is respectfully submitted that the statute in question violates the Constitution of the United States and should be declared null and void as against citizens of other States. The decree appealed from should be affirmed.

JOHN W. GRIGGS,
Counsel for the State of New Jersey
as *Amicus Curiae*.

APPENDIX.

Extracts from opinion of Judge Campbell in Shaffer v. Howard, 250 Fed., 885, etc.:

"From a reading of the Oklahoma income tax act, it is clear that, so far as it relates to residents of the state, the Legislature did not intend that it should be levied upon or have any relation or reference to property or the operations of any trade or business within the state; for, as to residents of the state, the tax is levied upon 'the entire net income of such persons arising or accruing from all sources,' including, of course, those without as well as those within the state; and it must be presumed that the Legislature well understood that they had no power to tax property or business operations outside of the state. A resident of the state is made subject to a tax upon his net income, even though all of it arises from property or activities without the state. Taxation and protection are reciprocal. The right to tax an individual results from the general protection afforded him and his property by the state. *Cooley on Taxation,* Vol. 1, p. 22. The resident of the state is subjected to the income tax for the protection the state affords his person, not his property or any right to do business in the state exercised by him; else it could not be made to extend to a resident who neither had property nor did business within the state, and by terms of the act it is a *like tax* which is attempted to be levied upon non-residents to the extent of their net income from property owned, and business, trade, or profession carried on in the state. * * *

"The Oklahoma income tax is clearly not a property tax in so far as it relates to residents of the state. As said by the Supreme Court of Wisconsin in relation to the income tax of that state, the income tax in this state, as applied to residents, does not seek to reach property or interest in property as such; it is a burden laid upon the recipient of the income. While conceding that this

income tax is not a property tax, nor a tax directly imposed upon any business, trade, or profession carried on by the non-resident, counsel for defendants insist that for 'jurisdictional purposes' the fact that the income subjected to the tax is derived from property or business within the state may be looked to. In their brief counsel for defendants say:

" 'Let us again here emphasize the fact that income has no relation to the property producing the same, nor to the business from which the same was produced, except for jurisdictional purposes alone; and this is not peculiar to income tax alone, but applies with equal force to other forms of taxation.'

"But this cannot be sound. In the first place, it will not do to say that this tax may be imposed upon residents of the state upon one theory, that is, the protection they receive in their persons, irrespective of situs of property or business activity, and upon non-residents, over whose persons the state has no jurisdiction, upon another theory, that the income arises from certain property or business enjoying the state's protection. If the tax is one pertaining solely to the person of the taxable, as we have seen is clearly the case in relation to residents, then it cannot be imposed upon non-residents, for they are not within the taxing power of the state so far as their persons are concerned. This was evidently in the minds of the legislators, and hence they attempted to bring their incomes within the state's jurisdiction to tax them by attempting to relate them to the sources within the state from which they might be derived. But this, while denominated an income tax, is in reality a tax upon the property or business producing the income, measured by the income. The basis of such tax must be the protection which the state affords the property or business, and no mere legislative nomenclature can make it other than a tax upon such property or business.

* * * * * * * *

"Keeping in mind that the taxing power of the state is limited to the three subjects—persons, property, and business—and that, as said by Justice Field in the case involving tax on foreign-held bonds, *supra,* whatever form taxation may assume, it must relate to one of these subjects, and keeping in mind also the inability of the state to subject to tax the person of a non-citizen as well as any property lying without the state, or any business transacted without the state, the tax under consideraion must have relation to the person, property, or business of the defendant. We have seen that as to citizens and residents of the state it clearly has relation to the person of the taxable as the recip'ent of the income, to the exclusion of any consideration of the source of such income, based upon the theory of the protection which the state affords him in his person as one of its citizens; but this theory fails when we come to consider non-citizens, for the state affords them no protection in their persons, and, being outside its territorial limits, it has no power or jurisdiction to impose upon them a tax purely personal in its nature. Nor does the fact that such non-citizen owns property or does business within the state empower the state to impose upon him a purely personal tax. It may tax such *property or business,* but it cannot, by calling such tax an income tax, change the nature of the tax. It would still be a property tax or an excise tax, according as it related to property or business. It is clear that the Legislature, realizing its inability to subject non-citizens to a tax purely personal in its nature, but desiring to bring them within the operation of its income tax law to the extent that their incomes are derived from property owned or business transacted within the state, has attempted to impose upon them what it styles an income tax, but which is essentially a property or excise tax, measured by the net income derived from specific property or business within the state. But the property and business of non-citizens, while properly subject to any existing tax legislation operating alike upon citizens and non-citizens, may not be

singled out and subjected to a tax which is not also imposed upon the property and business of citizens, merely because being that of non-citizens.

* * * * * * * *

"The tax under consideration is, as to citizens of Oklahoma, properly termed an income tax, because it is imposed upon them as a purely personal tax, measured by their incomes, in consideration for the protection which the state affords them in their persons, irrespective of the source of such income, or whether it be within or without the state, and the power of the state to levy such a tax upon its citizens is not questioned. But such a tax cannot reach citizens and residents of other states. In their persons they are only subject to the taxing power of the states of their domicile. If they acquire property or do business in this state, they may be taxed as to such property or *business* to the extent, and only to the extent, that citizens of this state are taxed on similar property or business. Provisions for such taxes are found in laws other than the income tax law now being considered, and they apply to citizens and non-citizens alike. To the taxes provided by these laws, so far as they exist, the property and business of the plaintiff within this state are subjected equally with the property and business within the state of all other persons, resident and non-resident. This being true, to subject the plaintiff to this so-called income tax, which, as we have seen, as applied to a non-resident, is essentially a tax upon his property and business within the state, to which the property and business of citizens and residents of the state are not subjected, is to deny to him the privileges and immunities of citizens of the state; for while by the same law a tax is imposed upon citizens of the state, it is, as we have seen, a purely personal tax, not in any true sense a tax upon their property or business, and a tax to which the state cannot subject the plaintiff, because, being a citizen and resident of another sovereign state, this state has no jurisdiction to tax him on his person. Whether he shall be subjected to such

personal income tax is a matter solely within the power of the state of his domicile to determine.

"While styled an income tax, the subject of this tax is the recipient of the income. The income merely affords the measure of tax. This is the dominant conception in all modern so-called income tax legislation by the several states, so far as relates to residents and citizens of the state. The situs of the source of the income is ignored. The power to tax rests in the jurisdiction exercised by the state over the person receiving the income, and that its jurisdiction may not extend to the property or business producing the income is considered immaterial. The attempt to combine with legislation providing for such a tax a provision for a so-called income tax subjecting the net incomes of non-residents upon property or business within the state, founded not upon jurisdiction of the person, but upon the fact that the situs of the property or business is within the state, cannot, in my judgment, be sustained. They are essentially separate and distinct provisions, relating to separate and distinct subjects of taxation, and the latter provision as to non-residents is in no wise strengthened because it is found coupled with the former. It is essentially a tax upon the property or business involved. In fact, it must be that, for it will not be contended that the state has the power to subject non-citizens to a *purely personal tax*. For the purpose of determining its validity, it must be considered as standing alone; and, of course, it will be conceded that an act imposing a tax upon the property or business owned or conducted within the state by non-residents, without imposing a like tax upon the property or business of residents, cannot be sustained.

"It is suggested that, because non-residents can come into Oklahoma and make fabulous profits from the exploitation of its great natural resources, it is desirable that the state furnishing such opportunities should, as a consideration therefor, be permitted to exact a return in taxation commensurate with the opportunities afforded:

and it is further suggested that, if these non-citizens cannot be taxed on their incomes as is sought to be done here, many operators who are now citizens and residents of the state will expatriate themselves, so as to avoid the income tax. But these are considerations which in no sense affect the legal questions involved. The Constitution of the United States has decreed that the natural resources of Oklahoma, however great, as well as those of every other state, are subject to development by all citizens of the United States alike, regardless of state lines, and citizens of other states may acquire property and do business here without subjecting themselves to liability for any purely personal taxes such as may be assessed against citizens and residents, and shall be subject to only such taxes on their property and business within the state as shall be levied upon similar property and business of citizens and residents of the state."

Extract from McMaster's "History of the People of the United States," Vol. I, page 404:

"The Legislature, in an evil hour, passed an act aimed full against the commerce of Connecticut and New Jersey. To supply the great city with firewood, vegetables, and fowls had long been a source of income to her neighbors, and a brisk trade had grown up. Early on the morning of every market-day the broad sheet of water that separated Paulus Hook from the city was dotted with shallops loaded to the water's edge with butter and cheese, turnips and carrots, with, in fine, all those varieties of vegetables and fruit for which the Dutch farms of New Jersey were even then famous. Every week there drew up at the docks vessels from Connecticut bringing hundreds of cords of the best firewood the market could supply. To such proportions had the business grown that it was commonly believed that several thousand pounds sterling were in this way drawn out of the city by the Jerseymen and Yankees. This trade the Assembly determined to crush,

and framed and passed an act the consequences of which were not foreseen. Every wood-boat, every shallop, every small sloop from New Jersey of more than twelve tons burden, it was decreed, should henceforth be entered and cleared at the Custom-House in the same manner as packets that came from London or any other foreign port. The moment the law went into operation the boatmen plying between New York and the northern shore of New Jersey cried out that they were ruined men; that almost the whole of their small profit was taken from them and put into the hard, griping hands of the officers of the customs at New York. To retaliate by raising the price demanded for their produce was impossible, for the increase would be so great that half the consumers would cease to buy.

"The Legislature at Trenton heard their cry, and resolved to be signally revenged. The corporation of the hated city was the owner of four acres of land on Sandy Hook, in the State of New Jersey. The plot had been purchased from the original proprietor for the purpose of maintaining upon it a light-house, a public inn, and a kitchen-garden. The light-house was already built, and on this was now laid a tax of thirty pounds a month.

"The restrictions placed on boats from Connecticut were much the same as on those from across the Hudson. The rate of dockage was raised, small sloops forced to pay an entrance-fee, and the carting of firewood across the city heavily taxed. No notice was taken by the Connecticut Assembly. But the business men at New London, whence most of the boats went out, were greatly incensed. It seemed, they declared, as if the time was at hand when, between the British Navigation Act, the lack of commercial treaties with continental powers, the Barbary xebecs, and the selfish policy of New York, there would not be a port on the face of the earth where an American vessel could trade. But they would see what could be done. They would strike back with all the power at their command, and flattered themselves they could

make the blow felt. A league was formed, and a paper passed about, which bound all who signed it, under penalty of fifty pounds to be collected by a civil process in any court of law, not to send into the State of New York any article whatever, nor to furnish any craft bound for that State with any kind of lading for one year from the twentieth of July, 1787. The agreement was faithfully kept. Yet little came of it. The supplies withheld by the New London merchants were obtained elsewhere, and, before the year specified in the agreement had passed, ten States had ratified the Constitution, and the power of New York to tax her neighbors was taken away forever."